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MILITARY LAW

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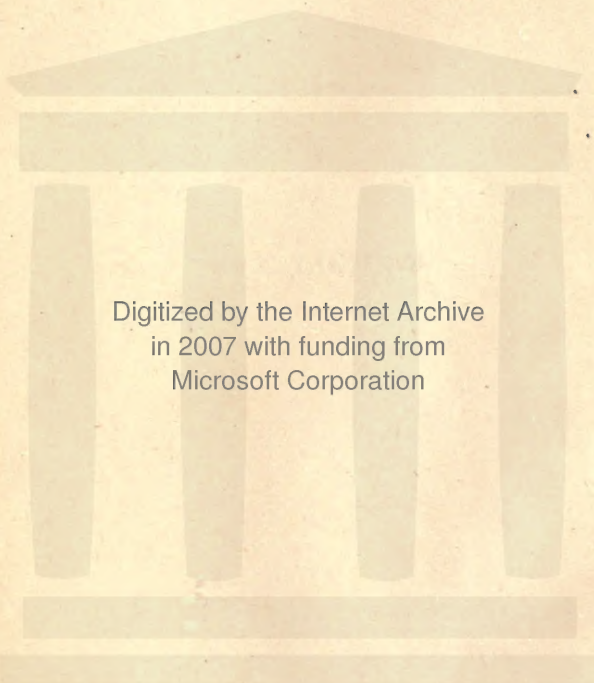
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MILITARY LAW



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MILITARY LAW

ITS PROCEDURE AND PRACTICE

BY

LIEUT.-COLONEL SISSON C. PRATT

(LATE) ROYAL ARTILLERY

NINETEENTH EDITION

REVISED AND CORRECTED UP TO SEPTEMBER, 1915

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PREFACE

TO THE NINETEENTH EDITION

Under the Territorial and Reserve Forces Act of 1907, the units of Militia in the United Kingdom (with the exception of 23 which were disbanded) were transferred to the Special Reserve, and those of the Yeomanry and Volunteers were either transferred as units or amalgamated or reconstituted to form units in the Territorial Force. With but few exceptions the auxiliary forces of Militia, Yeomanry and Volunteers ceased to exist in 1908, and the legal enactments and references made to them are practically obsolete.

The enactments and provisions of the present Military Law are contained in the Army Act, the Reserve Forces Acts, the Territorial and Reserve Forces Act of 1907, and the Rules of Procedure. Notes to the above, marginal references, indexes, and chapters in the Official Manual are useful and generally correct guides in assisting an officer to form an opinion, but they are *not law*. In distinction to matters of Law there are matters of Regulation, contained for the most part in the King's Regulations, Royal Warrants, Army Orders, and the Regulations for the Reserve and Territorial Forces.

A regulation may restrict the application of a law, but cannot alter it, and when law and regulation come in conflict, it is obvious that the latter must give way.

Regulations are not drawn up by lawyers, and must not be construed too literally. To quibble over the exact meaning of a word in a paragraph of the King's Regulations or of an Army Order is very apt to lead to error.

When a doubt arises as to the application of the law in any particular case, it is referred to the Judge-Advocate-General for his opinion, and this opinion, when officially expressed, practically settles the view to be taken. In matters of regulation the official decision of the Army Council is equally conclusive. An official interpretation of a law or regulation, when once given, puts an end to argument or criticism on the point involved.

All troops serving under the Army Act in the United Kingdom and abroad, except in India, are during the war to be considered on active service, and any law or regulation that is applicable solely in time of peace is temporarily in abeyance.

I shall be glad at any time to give my opinion on debatable points of military law to officers who write to me and enclose a stamped and directed envelope.

S. C. P.

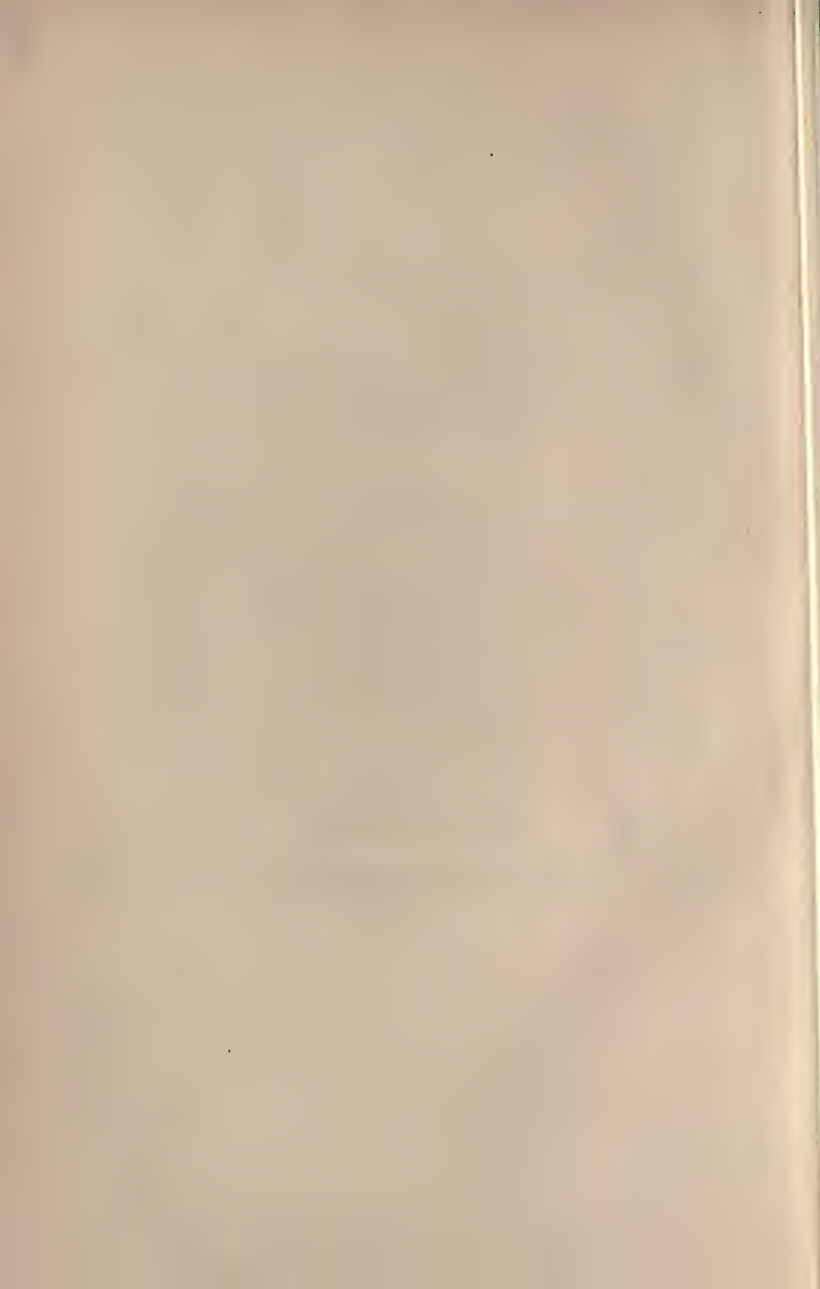
Charminster, Dorset.

September, 1915.

ABBREVIATIONS USED

M. v 72	..	'Manual of Military Law,' Chapter 5, paragraph 72, 1914.
M. 775	..	'Manual of Military Law,' page 775.
S. 5	..	Section 5, Army Act.
T.F.A. 10	..	Section 10, Territorial and Reserve Forces Act, 1907.
R.F.A. 20	..	Section 20, Reserve Forces Act, 1882.
R. 30	..	Rule 30, Rules of Procedure.
K. 400	..	Para. 400, King's Regulations, 1912.
A.O. 26 /88	..	Army Order, No. 26 of 1888.
T.R. 200	..	Para. 200, Territorial Force Regulations, 1912.
A.R. 50	..	Para. 50, Army Reserve Regulations, 1911.
S.R. 20	..	Para. 20, Special Reserve Regulations, 1911.
P.W. 582	..	Para. 582, Pay Warrant, 1914.

The large-sized figures in the margin refer to paragraphs on other pages.



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MILITARY LAW

CHAPTER I

HISTORY OF MILITARY LAW

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1. MILITARY LAW.—In order to maintain proper discipline in the army, it has been found necessary to confer special powers on the military authorities to enable them to deal with offences which it would be either dangerous or impossible to leave to the civil power.

The military law which governs the soldier in peace and in war, at all times and in all places, is regular in its procedure, is administered according to an authorised code, and deals only with soldiers and persons who are from circumstances subjected to the same law as soldiers. The term 'military law' is frequently used in a wider sense, to include not only the disciplinary, but also the administrative law of the army, as, for instance, the law of enlistment and billeting.

It is embodied in the Army Act, which is part of the statute law of England, and is judicially recognised by all civil courts.

The administration of the code is simplified by means of Rules of Procedure, Regulations, and

Orders, which lay down the manner in which the law is to be carried out by the military courts.

The principles of civil law are as far as possible observed, but its technicalities are laid aside.

2. CIVIL LAW.—The civil law of the realm is derived from two sources :

(1) *The statute law*, the various Acts of which have been passed by both Houses of Parliament and approved by the Sovereign, which constitutes the written code.

(2) *The common law*, or that derived from precedent and immemorial usage. It is sometimes described as 'judge-made law,' as it is mainly derived from the decisions of celebrated judges.

The tendency of modern legislation is to replace common by statute law as far as practicable.

3. CIVIL *versus* MILITARY LAW.—The civil law is 61 binding upon all persons, and the fact of a man being a soldier in no way frees him from his obligations as a citizen. The soldier is bound to come in contact with the civilian in many instances, as in the case of billeting, impressment of carriages, tolls and recruiting regulations, and hence it is clear that the statute military code must to a certain extent affect civilians.

Civil law is for many reasons inapplicable to military wants. Its procedure is too slow and its elaborate code requires the services of trained administrators.

Many of the most serious military offences, such as desertion, disobedience of orders, insubordination, drunkenness on duty, sentry sleeping on his post, absence, etc., are, moreover, mere breaches of contract in civil life, or, if otherwise, are treated with too much leniency by civil courts.

No conviction by a military court exempts an S. 46 offender from being subsequently tried and punished S. 15 by a civil court, but regard must be paid to the S. 16 amount of punishment already undergone. On the

other hand, a person who has been acquitted or convicted by a civil court or court-martial, or who has been dealt with summarily by a commanding officer, cannot again be tried by court-martial or punished by a commanding officer for the same offence.

4. ORIGIN OF ARTICLES OF WAR.—The necessity 10
of having some means of legally punishing soldiers M. ii 3
for breaches of military duty existed from the earliest times.

Before the establishment of a standing army no necessity existed for a military code in time of peace. In time of war, however, 'ordinances' or 'articles of war' were issued by the Crown; or by the Commander of any army with authority from the Crown, to govern the troops when actually engaged in hostilities. At the close of a war the army was disbanded, and the articles ceased to have effect.

The earliest code of articles of which record remains were those issued by Richard II. and Henry V. on the occasion of wars with France.* The punishments awarded for crimes were very severe, death and loss of limb being inflicted for comparatively trifling offences.

In accordance with the spirit of the times the military code gradually became more lenient, and during the wars of the Great Rebellion the articles in force assumed a form differing but little from those finally abolished in 1879.

The establishment of a standing army in 1660 made it necessary to have articles and regulations to govern it; but these were never sanctioned by Parliament, and the special powers assumed by the Crown were insufficient to maintain a proper discipline.

The passing of the Mutiny Act in 1689 created for M. ii 18
the first time a *statute* military law, in time of peace.

* Grose, *Military Antiquities*.

which forbade any punishment extending to life or limb being inflicted in the United Kingdom except in accordance with the Act.

The royal prerogative as to making articles for governing troops in time of war was thus in no way interfered with, while military courts in time of peace were tacitly allowed to deal with minor offences so long as they did not infringe the limitations laid down by the Mutiny Act, or interfere unduly with the civil law.

In 1712 statutory power was given to the Crown to make Articles of War for all troops serving in Her Majesty's dominions abroad, and in 1715 the outbreak of the Rebellion led to a similar power being conferred for the governance of troops at home. In 1718 the preceding Acts were consolidated and the discipline of the army in every part of His Majesty's dominions both in peace and war and at home and abroad was regulated partly by the statutory Act and partly by Articles sanctioned by it. The statutory Articles did not, however, extend to foreign countries, and troops engaged in active service in such countries were governed as before by Articles issued under the royal prerogative.

In 1803 the great change was made of extending M. ii 31 the Mutiny Act and the statutory Articles to the army whether within or without the dominions of the Crown. There was no longer a necessity for the Crown to exercise its prerogative, and the army became governed under all circumstances by statute law.

5. THE FIRST MUTINY ACT.—Reference must now M. ii 7 be made to the statutory Act. The attempts made by the Crown to enforce military law in time of peace—notably by Charles I.—led to constant conflicts between Parliament and the King.

The necessity of having a legal military code did M. ii 16 not, however, become very apparent until a standing army was sanctioned, in 1660.

The growth in power and numbers of this force was viewed with some apprehension by Parliament, and articles for its government were tolerated rather than sanctioned.

Punishments amounting to loss of life or limb were prohibited, and the state of discipline became very lax.

A bill for the better regulation of the discipline of the army was introduced in 1689, and its passage through Parliament was somewhat hurried by reason of the mutiny of some Scotch regiments at Ipswich who had been ordered to Holland, but, refusing to go, had marched northwards, declaring that James II. was their rightful king. M. ii 17

This bill, which is known as the first Mutiny Act, was prefaced by a preamble (now reproduced in every Army Annual Act) stating that the maintenance of a standing army in time of peace without the consent of Parliament and the employment of martial law were both illegal. Mutiny and desertion were made punishable by death, and the assembly of courts-martial authorised; and it was further provided that the bill should not interfere with the civil law or extend to the militia.

The duration of the Mutiny Act thus made was limited to seven months, but with few intermissions it has since been renewed annually up to 1878.

The Mutiny Act as originally passed only applied to England and Wales. Its power was gradually extended over Ireland in 1702, Scotland in 1707, the Colonies in 1718, and to the army irrespective of place in 1803.

In conjunction with the Mutiny Act the army was ruled for many years by the Articles of War issued under royal prerogative, and, as has been above shown, the royal prerogative was gradually encroached upon, and finally replaced by a statutory power in accordance with the Act in 1803.

The inconvenience of having a military code contained partly in a statutory Act and partly in Articles M. ii 33

derived from that Act led finally to a consolidation of the two in the Army Discipline Act of 1879, which two years later was repealed, and with some amendments re-enacted in the Army Act of 1881. 9

6. ORIGIN OF COURTS-MARTIAL.—The administration of the military code in the first instance under Articles of War, and subsequently under both the Mutiny Act and Articles of War, was carried out by means of military courts. The first of these appears to have been the ‘curia militaris,’ or court of chivalry, which was part of the Aula Regia, or supreme court of great officers of State, established by William the Conqueror. M. ii 8

The Court of Chivalry consisted of the Lord High Constable, who was the King’s general and commander-in-chief, and the Earl Marshal, whose duty it was to marshal the army, and ascertain that all persons liable to serve fulfilled their liabilities.

‘To the constable it appertaineth to have cognizance of all contracts and deeds of arms, and of our war out of the realm, and also of things that touch war within the realm, which cannot be determined by common law.

‘All appeals of things done within the realm shall be tried and determined by the good laws of the realm made and used in the time of the King’s noble progenitors, and all appeals to be made of things done out of the realm shall be tried and determined before the constable and marshal of England for the time being.’*

In time of war the court of the constable, as it was usually called, followed the army, and punished summarily according to the Articles of War for the time being in force.

It is evident that a single court was incapable of dealing with troops acting in different places, and

* 1 Hen. IV. c. 14. 13 Rich. II. c. 2. An interesting account of the rise of military law is to be found in *Adye on Courts-Martial*.

additional constables and marshals were delegated by commission from the Crown to form other courts when required.

The office of High Constable was abolished in the reign of Henry VIII., and with it lapsed all the criminal jurisdiction of the Court of Chivalry. With the concurrence of the judges of the common law, the marshal occasionally held a court himself on purely civil matters, but the jurisdiction and power of punishment of the court was so limited that, although never legally abolished, it became extinct.

From the death of the last hereditary High Constable up to the recognition of military courts by statute in 1689, military law was administered by means of commissioners, by the general in command of the troops sitting himself as marshal, or by means of deputies which he was authorised to appoint.

The commissioners or deputies were usually officers of the army, and at the beginning of the great civil rebellion habitually formed courts or councils of war, in accordance with the then existing continental military jurisprudence.

These councils of war some few years prior to the passing of the Mutiny Act were called courts-martial,* and, with slight modifications as to constitution and power, are the existing military courts.

In the earlier courts-martial the general or M. ii 15 governor of the garrison who convened the court ordinarily sat as president, the power of the court was plenary, and the sentences were carried into execution without the confirmation required under the present law.

* The true derivation of the word 'martial' opens out an interesting field of inquiry. Simmons and others hold that courts-martial derive their name from the Court of the Marshal; but there is a good deal to be said against this view, as the words 'martial' and 'military' are in some of the old records synonymous.

CHAPTER II

*THE MILITARY CODE, AND PERSONS
SUBJECT TO IT*

7. THE MILITARY CODE. 8. ARMY ANNUAL ACT. 9. ARMY ACT OF 1881—Its Contents. 10. ARTICLES OF WAR—Indian Articles of War. 11. RULES OF PROCEDURE. 12. KING'S REGULATIONS. 13. ROYAL WARRANTS. 14. GENERAL ORDERS AND ARMY CIRCULARS. 15. ARMY ORDERS. 16. ORDERS IN COUNCIL. 17. OTHER ACTS—Railway Acts—Regimental Debts Act—Regulation of Forces Act—National Defence Act—Acts affecting the Reserve and Territorial Forces—The Official Secrets Act—Defence of the Realm Act, etc. 18. PERSONS SUBJECT TO MILITARY LAW—Regular and Reserve Forces—Territorial Forces—Indian and Colonial Forces—Civilians.

7. THE MILITARY CODE is embodied in the Army Act, Rules of Procedure, King's Regulations, Army Orders, Royal Warrants, and Orders in Council. To these may be added the Acts and Regulations for the governance of the Reserve and Territorial Forces.

There are also certain rules or 'laws of war' which are recognised as binding by all civilised nations, and derive their authority either from usage or express international agreement.

8. THE ARMY ANNUAL ACT is passed each year (usually in April), for the purpose of providing during twelve months for the Discipline and Regulation of the Army.

In the preamble it is pointed out that, unless it be with the consent of Parliament, the maintenance in

time of peace of a standing army within the United Kingdom is illegal, that an army (of stated strength) as well as a force of marines is necessary for the safety of the United Kingdom and the defence of the possessions of the Crown, and that the discipline of these forces must be provided for by a code that will ensure speedy punishment for military offences.

The operation of the Army Act is therefore every year extended to the following dates in the subsequent year :

In the United Kingdom, the Channel Islands and the Isle of Man, to April 30.

Elsewhere to July 31.

And it is provided that the Army Act while in force shall apply to all persons subject to military law whether within or without H.M. dominions.

Any amendments of the Army Act that may be deemed necessary are next dealt with, and the prices to be adopted in respect of billeting added in a schedule.

9. THE ARMY ACT is the basis of the present military M. ii. 34 code. It has of itself no force, but requires to be brought into operation by the Army Annual Act, thus securing the constitutional principle of the control of Parliament over the discipline requisite for the Government of the Army. It is divided into five parts, viz. :

(1) *Discipline*.—This part deals with the various military crimes and their maximum punishment, authorises the formation of military courts, and legislates for their procedure and the carrying out of the sentences awarded by them. It also gives the Sovereign power to make Articles of War and Rules of Procedure in accordance with the provisions of the Act.

(2) *Enlistment*.—The law is laid down as to the terms upon which a man enlists and reckons service ; arranges for his transfer, re-engagement, prolongation of service, and discharge ; and deals with those

special provisions in regard to enlistment in which both soldiers and civilians are concerned.

(3) *Billeting and Impressment of Carriages*.—This portion of the Act only comes in force when troops are on the move in the United Kingdom, and arrangements have to be made through the medium of the police with the civil population in order to provide food for the soldier, and carriage for his effects.

(4) *General provisions*.—These refer to details connected with the military courts and their jurisdiction, military prisons, the pay and privileges of the soldier, legal penalties in matters respecting the Forces and miscellaneous regulations.

(5) *Application of the Act*.—The persons subject to military law are classified in detail, definitions are given of the various terms used in the Act, and saving clauses and schedules added as to its application.

10. ARTICLES OF WAR.—The Sovereign is authorised S. 69 by the Army Act to make Articles of War, but no 4 crime specified in the Act can be punished otherwise M. iii. than in accordance with its provisions, nor can any 38 crime not mentioned in the Act be punished by death or penal servitude. Owing to the completeness of the present military code it is doubtful if articles will ever again be issued, but if so, they are to be judicially noticed, and will apply only to persons subject to military law, while the Army Act as it stands affects in some cases the civilian population.

The Indian Articles of War are embodied in an Act S. 175 of the local legislature, and affect all *native* officers, S. 176 soldiers, and other persons belonging to, or serving S. 177 with, any portion of His Majesty's Indian Army. S. 180

Americans and Christian Europeans (other than English) and their legitimate Christian descendants belonging to the Indian Army are also subject to the Indian law, but must be tried by courts-martial composed of European officers only.

All British-born subjects and their legitimate

Christian descendants belonging to the Indian Army 18
are amenable only to the provisions of the Army
Act.

The power of the Admiralty to make *Articles of War* S. 179
for the government of marines is distinctly recognised.

11. RULES OF PROCEDURE.—The Sovereign is S. 70
authorised to make Rules, under the hand of a Secretary of State, for the purpose of carrying the Army Act into execution so far as relates to the investigation, trial, and punishment of offences. They deal with the investigation and disposal of offences by a commanding officer; the convening and constitution of courts-martial; the framing of charges, and preparations for the defence; the procedure to be observed in trials by court-martial; the confirmation and revision of findings and sentences; general provisions as to proceedings of court, witnesses, evidence, friend of the accused, counsel, judge-advocate, and record of transactions; field-general courts-martial, and courts of inquiry. Forms as to courts-martial, charges and commitments to prison are added in appendices. The Rules of Procedure must not contain anything contrary to or inconsistent with the provisions of the Army Act, are to be judicially noticed, and are to be laid before Parliament as soon as practicable after they are made.
12. THE KING'S REGULATIONS deal with the organization and commands of the army and the appointment, duties and responsibilities of officers. They lay down detailed instructions as to the maintenance of discipline, the interior economy of corps, military training and education and the general duties of troops in time of peace.
13. ROYAL WARRANTS are issued from time to time by the Crown through the Secretary of State, as responsible to Parliament, and lay down the permanent regulations as to the government, pay, promotion, or conditions of service in H.M. Forces.

14. **GENERAL ORDERS AND ARMY CIRCULARS.**—Prior to 1888 General Orders were issued monthly to the army by the Commander-in-Chief as the representative of the Crown, while Army Circulars were issued by the Secretary of State for War as the representative of Parliament and the Treasury.
15. **ARMY ORDERS.**—All Royal Warrants (signed by the Secretary of State for War), General Orders, Regulations, and Instructions to the Army are now promulgated monthly in 'Army Orders,' which are issued by direction of the Army Council.
16. **ORDERS IN COUNCIL** are the regulations laid down M. 728 by the Crown with the advice of the Privy Council. In matters of discipline they are only issued to meet cases which cannot be conveniently dealt with by Royal Warrants or Army Orders.
17. **OTHER PARLIAMENTARY ACTS.**—The following Parliamentary Acts are also at present in force, and affect persons therein referred to:
- (1) *Certain Railway Acts* dealing with the conveyance of troops by rail.
 - (2) *The Regimental Debts Act*, which arranges for the distribution of effects in the case of death of an officer or soldier.
 - (3) *The Regulation of the Forces Act*, 1871.—The chief unrepealed section is one giving power to the Government to take possession temporarily of any railroad in the United Kingdom in cases of emergency.
 - (4) *The National Defence Act*, 1888, which gives the Government power when the Territorial Force is embodied to have precedence of traffic on all railways.
 - (5) *The Reserve Forces Act*, 1882 (with subsequent amending Acts), *the Territorial and Reserve Forces Act* of 1907, and the Official Secrets Act of 1911, the Defence of the Realm Act, the Suspension of Sentences Act, etc.
18. **PERSONS SUBJECT TO MILITARY LAW.**— S. 175
Regular Forces.—Officers of the regular forces on the S. 176

active list (including seconded and half-pay officers) and soldiers of the regular forces. Officers not on the active list are only subject to the law if employed on military service under an officer of the regular forces, or if as reserve officers they are called out for service. (*See definition Regular Forces and modifications below as to Indian Army, Marines and Colonial forces.*) S. 175

Reserve Forces.—Officers of special reserve units (including officers of the special reserve of officers) Army reservists and special reservists when called out for training, in aid of the civil power, on permanent service, and when employed in military service under the orders of an officer of the regular forces and at all times in respect of liability to trial for certain offences specified in the Reserve Forces Acts. When called out on permanent service the reserve forces form part of the regular forces. S. 176 R.F.A. 6, 15

Pensioners.—Soldiers when employed in military service under an officer of the regular forces. . . .* S. 176

Marines.—Officers and soldiers generally when not subject to the Naval Discipline Act, but the jurisdiction of the Admiralty is not interfered with. S. 179 S. 190 (8)

Territorial Force.—Permanent staff and officers always; soldiers when embodied, out for training, attached to regulars, or called out for actual military service for purposes of defence in pursuance of any agreement. A territorial force reserve, in process of being raised, and when called out will form part of the territorial force. S. 175 S. 176

The officers of the *Officers' Training Corps* are always subject to military law, but the cadets have no legal liability. *National Reservists* become subject to military law if accepted for service on mobilization.

* There are no positions held at present by pensioners (or army reservists) which render them subject to military law in time of peace.

Indian Forces.—All British-born subjects and their legitimate Christian descendants belonging to His Majesty's Indian Army, officers in the Indian Army Reserve when called out in any military capacity. S. 180 S. 175 S. 190

All officers, soldiers, and followers of His Majesty's Indian Forces, who are natives of India, are subject to the Indian military law, but a court for their trial can be convened under the Army Act. 10

Colonial Forces.—Colonial troops raised at the imperial expense or under imperial control, when serving under the command of an officer of the regular forces. S. 175 S. 176

Any law of India or a colony may apply the provisions of the Army Act, wholly or partially, to forces *locally raised*, subject to such adaptations as may be necessary to make them applicable. Where such forces are serving with regulars, any deficiencies of Colonial law may be remedied by treating them as regulars under the Army Act, subject to such exceptions and modifications as the G.O. commanding may make. S. 177

Individual members of Indian and colonial forces when attached to any part of the home forces in the United Kingdom are subject to the Army Act.

Civilians.—All persons attached to or accompanying a force on active service, either in an official capacity or as holding a pass, employed by the troops, or a camp follower. (Natives of India remain subject to the Indian military law.) S. 175 S. 176 S. 184

It should be remembered that the Army Act is part of the statute law, and that all persons, irrespective of their being subject to military law, are bound to obey those provisions of it which are applicable to them : for instance, policemen are liable with regard to billeting and impressment of carriage, innkeepers with regard to billeting, and all persons in reference to certain offences relating to desertion, enlistment, purchasing regimental necessaries, &c. S. 109 S. 116 S. 110 S. 152 S. 98 S. 156

CHAPTER III

MILITARY CUSTODY

19. MILITARY CUSTODY—Offences against—No Duty while in—Informal Custody—Detention in Custody—Ordering into Custody. 20. ARREST OF OFFICERS. 21. ORDERING ARREST OF OFFICER. 22. REPORT OF ARREST. 23. REFUSAL OR APPEAL. 24. RELEASE FROM ARREST. 25. ARREST OF NON-COMMISSIONED OFFICERS. 26. ARREST OF WARRANT OFFICERS. 27. PRIVILEGE FROM ARREST. 28. WRONGFUL ARREST. 29. ARREST OF SOLDIERS—The Gaoler—On the March—Treatment of Minor Offences—When Crime is confessed. 30. FORWARDING THE CHARGE. 31. REPORT OF COMMITTAL—Non-Delivery of Charge. 32. RELEASE FROM CONFINEMENT.

19. MILITARY CUSTODY.—Whenever a person subject 33
to military law is charged with an offence, steps
should be taken to have the matter investigated S. 45
without delay. If the offence is of a serious character, M. iv 1
or if the circumstances of the case render it advisable,
the person charged is taken into *military custody*, i.e.,
in the case of a private soldier (not under sentence) K. 473
placed in either open or close arrest.

Offences against.—Permitting the escape of a S. 10
soldier in arrest or his unnecessary detention or S. 20
irregular imprisonment are offences against military S. 21
law, and any soldier in arrest who resists an escort, S. 22

or escapes, or attempts to escape from lawful custody can be severely punished.*

No Duty while in.—An offender while in custody is K. 482 not to be required to perform any military duty further than may be necessary to relieve him from the charge of any cash, stores, or accounts for which he may be responsible. He is not to bear arms except by order of his commanding officer in an emergency or on the line of march, or in a detention barrack by order of the commandant for purposes of drill. On board ship he may, if allowed to remain at large, be employed on fatigue duties although he should not be placed on guard. If either from error or unavoidable circumstances he is put on duty, he is not thereby absolved from liability to be proceeded against for his offence.

Informal Custody.—When a soldier is in legal custody no technical informality in the order in pursuance of which he was brought into or kept in such custody shall cause his release, and any irregularity in the order may subsequently be amended. If the order proceed from a person having no authority to issue it, the Secretary of State should be applied to for a warrant. S. 172

Detention in Custody.—A person in custody must have S. 165 his case investigated without delay, and at all events R. 2 within 48 hours after his committal has been reported K. 484 to his commanding officer. Every case of a person being detained in custody beyond 48 hours is R. 135 to be reported to the officer to whom application would be made to convene a court-martial for the trial of the person charged. If an officer or soldier (not on active service) remains in custody for more S. 45 than 8 days without a court-martial being ordered R. 1 to assemble, a special report must be made by his

* An 'escort' is held to include a single non-commissioned officer or soldier who has been placed in charge of a soldier in arrest.

commanding officer to the officer to whom application would be made to convene a court-martial for the trial of the case, and a similar report must be furnished every 8 days till either the officer or soldier is released or a court is assembled for his trial. Any serious delay (15 days at home, 30 days abroad) in assembling a general or district court-martial is to be reported to the Army Council by the convening officer.

R. 17
77

Ordering into.—A person is usually ordered into military custody by an officer or non-commissioned officer of superior military rank, but provost-marshals (who can only be appointed abroad) have the power to arrest and detain any persons subject to military law who are committing an offence.

S. 45
K. 599
S. 74
M. iv 39

Naval officers in command of His Majesty's ships can order any officer or soldier to be put in arrest or confined for committing an offence against the good order and discipline of the ships.

M. 729

Officers and non-commissioned officers are as a rule put in *arrest*, and if the circumstances of the case require it they may be placed for custody under the charge of a guard, piquet, patrol, sentry, or provost-marshal. Soldiers are either placed under *close arrest* and put in confinement or allowed to be at large under *open arrest*.

K. 465
K. 473

Peers and Members of Parliament are not privileged from arrest, but the fact and cause of the arrest should always be communicated to the Lord Chancellor, or to the Speaker, as the case may be.

M. iv 9

20. ARREST OF OFFICERS.—Arrest is *close arrest* unless *open arrest* is specially ordered. An officer in close arrest is not allowed to leave his tent or quarters, except to take exercise under supervision. When in open arrest, he may take exercise at stated periods within defined limits, but must not appear at mess or any place of amusement or public resort. An officer in arrest must always wear uniform, but without sword, sash, belts or spurs.

K. 466
M. iv 3

- 21. ORDERING ARRESTS OF OFFICERS.**—An officer S. 45 can place in arrest any other officer of inferior rank, but no officer can order the arrest of an officer, non-commissioned officer, or soldier, if an officer of a rank senior to himself is present.

When occasion necessitates an officer being placed without delay under arrest, the senior officer present, if he be of a rank higher than the offender, should order it.

In the exceptional case of a 'quarrel, fray, or disorder' a junior officer may order the arrest of a senior S. 45 (even of a different corps) who is engaged in the disturbance. M. iv 6

An officer is put in arrest either directly by the M. iv 2 officer who orders it, or more generally through the medium of a staff officer. The order may be verbal or written, the latter being a preferable mode, except where the offence is committed in the presence of the superior officer.

When immediate action is not necessary it is better, K. 469 instead of putting an officer under arrest, to report him to his own commanding officer, who should inquire into the circumstances of the case, and not place the offender under arrest until he has satisfied himself that the matter must be proceeded with. If necessary, the adjutant or one of the acting regimental staff is then ordered to place him under arrest.

On being put in arrest an officer is deprived of his M. iv. 2 sword, and becomes to all intents and purposes a prisoner.

- 22. REPORT OF ARREST.**—When an officer is placed K. 469 under arrest (whether afterwards released or not) the commanding officer is directed to report the case without delay to the general or other senior officer in command. It is necessary, therefore, that an officer who places another in arrest should invariably report at once the fact of his having done so to the com-

manding officer of the offender, or direct to the senior officer in command in very exceptional cases.

23. REFUSAL OR APPEAL.—An officer cannot decline S. 9
to go under arrest when ordered by one senior to him- S. 10
self, nor can he refuse to obey the order of a junior in
the case of a 'fray.'
An officer under arrest cannot demand a court- K. 470
martial, nor can he decline to be released by proper
authority or refuse to return to duty.

24. RELEASE FROM ARREST.—Unless an arrest has K. 468
been made in error, an officer should not, as a rule,
be released without the sanction of the highest
authority to whom the case may have been referred.

25. ARREST OF N.-C. OFFICERS.—The restrictions as K. 471
to close and open arrest apply to non-commissioned
officers. If a non-commissioned officer is charged
with a serious offence he is placed under arrest by
the senior officer or non-commissioned officer on the
spot. In case of doubt the arrest may be delayed,
and if the offence is not of a serious nature it may be
investigated and disposed of without previous arrest.
A non-commissioned officer under open arrest is
forbidden to enter a liquor bar or corporal's room.

26. ARREST OF WARRANT OFFICERS.—A warrant S. 190
officer holding an honorary commission ranks as an S. 182
officer, and is similarly dealt with. All other war-
rant officers are treated as non-commissioned officers.

27. PRIVILEGE FROM ARREST.—An officer or non- S. 125
commissioned officer or other person who is sum- 229
moned to give evidence before a court-martial is
privileged from arrest on civil process, *e.g.*, for debt,
damages, etc., while going to, attending at, or returning
from the court. There is no privilege from arrest
on a criminal process, *e.g.*, on a charge for a felony,
misdemeanour, or other crime.

- 28. WRONGFUL ARREST.**—If an officer thinks that he has been wrongfully put in arrest, or is otherwise aggrieved, and does not obtain redress from his commanding officer, he can forward his complaint through the authorised channel to the Army Council and the Secretary of State for submission to His Majesty. S. 42
- Whether an action by a person subject to military law will lie against an officer for an act within the limits of his authority, but done maliciously and without probable cause, is a question on which judicial opinion has been divided. The present view appears to be that a civil court cannot give redress. M. viii 71
- 29. ARREST OF SOLDIERS.**—A soldier is either allowed to be at large under open arrest, or is placed under close arrest in the custody of a guard, piquet, patrol, sentry, or provost-marshal. He is not to be placed in close arrest for offences unaccompanied by drunkenness, violence or insubordination, unless confinement is necessary in the interests of discipline or to ensure safe custody. S. 45 K. 473 M. iv. 11 K. 475
- When a non-commissioned officer has to place a soldier in close arrest he will obtain the assistance of one or more private soldiers to conduct the offender to the guard-room and will himself avoid coming in contact with him. This rule does not apply to a non-commissioned officer of the military police.
- Except in cases of personal violence or when on detached duties, lance-corporals or acting bombardiers with less than four years' service will not place a private soldier in close arrest but will report the offence to the orderly sergeant, who will act as the circumstances of the case require. K. 477
- The Gaoler.*—A commander of a guard or provost-marshal cannot refuse to take charge of a soldier in arrest handed over to him for safe custody, and is bound not to improperly release such soldier or allow him to escape. S. 45 S. 20

On the March.—When troops are on the line of march, or when from any cause there is a lack of accommodation for the temporary custody of offenders, a soldier who is under close arrest or who is under sentence may be committed by order of his commanding officer to any prison, police station, lock-up, detention barrack, barrack detention room, or other place of confinement in which prisoners may legally be confined, for a period not exceeding seven days.

S. 132

Treatment of Minor Offences.—In the case of minor offences, unaccompanied with drunkenness, violence, or insubordination (unless confinement is necessary to ensure the safe custody of the soldier), the charge may be investigated and disposed of without confining the offender. A private soldier, against whom a charge for a minor offence is pending, will not quit barracks until his case has been dealt with. He will attend all parades, but will not be detailed for duty.

K. 475

K. 484

M. iv. 11

When Crime is confessed.—If a soldier makes a confession of desertion, or of having committed some offence against the laws of enlistment, and proof is not at once forthcoming, he may be allowed to continue at duty pending inquiry.

K. 479

30. FORWARDING THE 'CHARGE.'—The officer or non-commissioned officer who orders the arrest of a soldier should deliver to the official into whose custody he is committed an account in writing signed by himself of the offence with which he charges the accused. This account or 'charge' should be short, and contain all the material points connected with the accusation made. If the 'charge' is not delivered at the time of committal, a verbal report to the same effect is to be made. It should always be sent in as soon as possible, and its delivery should never be delayed beyond twenty-four hours.

S. 45

M. iv

14

S. 21

- 31. REPORT OF COMMITTAL.**—The officer or non-commissioned officer who is in charge of the guard must enter in the guard report the name and offence of the accused, and the rank and name of the person committing him. This report must be sent to the proper authority when the guard is relieved, and in any case within twenty-four hours, and the original 'charge' or a copy of it is to be forwarded to the commanding officer of the soldier. S. 45 S. 21 K. 463

Non-Delivery of Charge.—The non-delivery of a 'charge' should be noted in the guard report, and if it be not delivered within twenty-four hours the commander of the guard will either take proper steps for procuring it, or report the circumstance to the officer to whom his guard report is furnished. M. iv 16 K. 463

If no 'charge' or other evidence is forthcoming to justify the keeping of the soldier in custody, the officer to whom the guard reports are furnished will, at the expiration of forty-eight hours from the time of committal, order his release.

- 32. RELEASE FROM CONFINEMENT.**—A soldier when confined can only be released by proper authority. If all the circumstances connected with the offence are purely regimental, and the soldier is confined in the regimental guardroom, he can be released by order of his commanding officer. M. iv 11

If the soldier has been sent to a garrison guardroom, or while on his way to such custody has been temporarily entrusted for safe keeping to a regimental guard, permission for his release must be obtained from garrison headquarters.

CHAPTER IV

INVESTIGATION OF CHARGES

33. INVESTIGATION. 34. CHARGES AGAINST AN OFFICER. 35. CHARGE AGAINST A WARRANT AND NON-COMMISSIONED OFFICER. 36. CHARGE AGAINST A SOLDIER—Evidence—Summary of Evidence. 37. DISPOSAL OF OFFENCE—Summary Disposal—Application for Court-Martial.

33. INVESTIGATION.—The commanding officer of an officer or soldier who has been taken into military custody will take care to have the case investigated without delay. Every case of a person being kept in custody for more than forty-eight hours (exclusive of Sundays, Good Friday, and Christmas Day) after the committal has been reported to the commanding officer, and the reason thereof, shall be reported to the officer to whom application would be made to convene a court-martial for the trial of the person charged.

34. CHARGE AGAINST AN OFFICER.—Charges against an officer may be investigated either before or after he is placed in arrest, according to circumstances. The case is either examined into privately by a competent military authority or formally investigated by the commanding officer, or a court of inquiry is ordered to assemble.

273

An officer who is charged with an offence under the Army Act can demand the formal investigation of his case by the commanding officer. The investigation shall be held and the evidence taken in his

R. 8

R. 3

R. 4

R. 124

presence in writing, if he requires it, in the same manner, as nearly as circumstances admit, as is required in the case of a soldier.

When an officer is ordered for trial by court-martial without any such taking of evidence in his presence, an abstract of the evidence to be adduced shall be delivered to him not less than twenty-four hours before his trial, and shall be laid before the court-martial on its assembly. R. 8

The commanding officer of the accused is responsible that the investigation is commenced within forty-eight hours after the arrest has been reported to him, and that the case is either dismissed or referred to a superior, or that an application is made for a general court-martial through the usual channel. R. 2
R. 135
R. 4

An officer whose character or conduct has been publicly impugned is bound to submit the case to his commanding officer or other competent military authority for investigation. Pending the investigation he may be suspended from duty and placed under the same restrictions as in open arrest. K. 446

35. CHARGE AGAINST A WARRANT AND NON-COMMISSIONED OFFICER. A warrant officer holding an honorary commission ranks as an officer, and is treated as such. 48
S. 190

When a warrant officer not holding an honorary commission or a non-commissioned officer commits an offence he will usually be placed under arrest, but minor offences may be investigated and disposed of without previous arrest. If below the rank of sergeant he may be admonished or reprimanded but not severely reprimanded by his company commander. Serious cases are dealt with by a commanding officer. As a warrant officer cannot be punished by a commanding officer or tried by a regimental court-martial, the charge against him must either be dismissed or the case sent for trial by a district or general court-martial. K. 471
K. 499
S. 182

36. CHARGE AGAINST A SOLDIER.—Every charge against a non-commissioned officer or soldier will first be investigated by the company commander, who has large discretionary powers as to the disposal of offences. During investigation a soldier is to be deprived of his cap and any article that can be used as a missile. If the company commander decides to dispose of the case of a N.C. officer or soldier who is in open arrest he will procure A.F.B. 281 from the orderly room, enter on it the charge and award, and return the form to the orderly room. In the event of the case being reserved for the disposal of the commanding officer, the charge (A.F.B. 252) will be sent for entry in the guard report before the hour fixed by the C.O. for the disposal of soldiers. K. 484
53
K, 481

When the offence of a non-commissioned officer or soldier in close arrest is disposed of by the company commander he will at once report the fact to the orderly-room and the entry, "disposed of on A.F. B. 281," will be made in the punishment column of the guard report. Every Saturday A.F. B. 281 must be signed, whether blank or otherwise, by the company commander, and it will then be attached to the guard report of that day. All charges against N.C.O.'s and soldiers entered in the guard report and not disposed of by company commanders are investigated by the commanding officer in his orderly room every morning in the presence of the accused and the officer commanding his company, etc. M. iv 21

Investigation must be commenced within forty-eight hours after the committal of the accused to custody has been reported. In the case of drunkenness a delay of at least twenty-four hours is advisable in order to ensure that he is sober when brought up. 33
R. 2
K. 478

The leading facts connected with the offence charged are shown in the 'charge' forwarded by the person who ordered the arrest of the soldier. In some cases, however, additional incidents may be brought out in evidence in the orderly-room. The commanding officer should not, *as a rule*, make these addi- 30
M. iv
15

tional facts the cause of new charges being made against the accused, although he has the power to do so.

Evidence.—The accused may demand that the evidence be taken on oath, in every case that the C.O. has power to deal with summarily. The accused may apply to be called as a witness, and will give his evidence on oath if the other witnesses are sworn. R. 3 S. 46

If the C.O. after hearing the evidence is of opinion that the charge ought to be proceeded with, he will either (1) dispose of the case summarily if it is within his powers and he deems it expedient, or (2) refer the case to superior authority, or (3) adjourn the case for the purpose of having the evidence reduced to writing. 51

When a case is so adjourned the C.O. or an officer* appointed by him will take down in writing, in the presence of the accused, the evidence of each witness and any questions put by the accused in cross-examination, together with the answers to them. In reducing the evidence to writing immaterial statements may be omitted and all hearsay and irrelevant matter should be excluded. The evidence of each witness shall be read over to him and shall be signed by him. If the accused has already given evidence verbally he may *apply* to give evidence to be taken down in writing and inserted in the summary, but he cannot be *compelled* to repeat the evidence previously given. Any voluntary statement of the accused material to his defence is also taken down, but he should be warned that any evidence he gives or any statement he makes may be used as evidence against him. He need not sign the statement. R. 4 M. vi 81 258

As a rule, the summary of evidence should be taken on the same day as the investigation, and a statement that the requirements of R.P. 4 have been complied with should be entered at the end and signed by the officer taking the evidence. M. 704

The *summary of evidence* thus taken is to be care- R. 5

* An officer who has given material evidence at the investigation must not be chosen.

fully considered by the C.O., who may, if the case is within his jurisdiction, and the accused has not elected to be tried by a district court-martial, rehear the case, and, if he thinks fit, dispose of it summarily.

Otherwise he will remand the accused for trial by court-martial or refer the case to superior authority. R. 5

The *summary of evidence* may be used for certain limited purposes at the trial and also for the purpose of giving to the accused notice of the charge he will have to meet, and to the convening officer and president of the court notice of the case to be tried. M. iv 29 M. v 27 255

Either the summary itself or a true copy must be laid before the court-martial before whom the accused is tried, and a copy must be given gratis to the accused at the time he is warned for trial. R. 5 R. 14

In cases of emergency such as may arise on active service, on the eve of embarkation or on the line of march, the summary may be dispensed with, and it is not taken when a soldier is to be tried by a field general court-martial. R. 104

A witness who wilfully makes a false statement, or makes false accusations or gives false evidence on oath, can be punished, but, except in very flagrant cases of false accusations and perjury, proceedings should not be taken against an accused in respect of the manner in which he conducts his defence. S. 40 S. 27 S. 29

37. DISPOSAL OF OFFENCE.—On completion of the investigation the commanding officer proceeds to either— M. iv 23

(a) *Dismiss the case*, or remand the accused for further inquiry, or release the accused and order him to duty without prejudice to his re-arrest at a future time when further evidence may be forthcoming. K. 490 K. 485 R. 4

When, from want of jurisdiction, insufficiency of evidence, or any other cause, a case is dismissed, no entry will be made in the official books or record kept of the proceedings. S. 46

(b) *Refer the case to superior authority.* The usual cause of reference is, that the C.O. wishes to deal with K. 487

the case summarily, and the offence is one that he cannot deal with summarily without permission.

(c) *Summarily dispose of the case.*—The Class of K. 487 offences which a commanding officer *may* summarily K. 493 dispose of, and the punishments that *may* be awarded 39 (where a soldier does not elect to be tried by district court-martial), are clearly laid down. The offence 42 of drunkenness *must* in certain cases be disposed of summarily.

(d) *Order a regimental court-martial to assemble.*— R. 16 Owing to the power of punishment now possessed by R. 5 commanding officers, and the ability to form a dis- R. 14 trict court-martial of three officers, it will now be R. 135 rarely necessary to assemble a regimental court-martial, except for the trial of a non-commissioned officer on board His Majesty's ships. Exceptional cases may still arise, in small isolated detachments, on the line of march, or on board ship, where this court may, owing to the absence of a convening authority for a higher court, have still to be resorted to, but, as a general rule, when a case is not disposed of summarily a district court-martial should be convened. When the accused is remanded for trial by regimental court-martial it should be assembled within thirty-six hours, but in every case there should be an interval of eighteen hours between the time when he is informed of the charges against him and his arraignment.

(e) *Apply to a superior for a general or district 76 court-martial.*—Application is made to a superior K. 548 (within thirty-six hours) when the offence is beyond R. 5 the jurisdiction of a commanding officer, or when a R. 135 punishment more severe than can be inflicted by a K. 487 commanding officer or a regimental court-martial is, from the circumstances of the case, desirable, or when a soldier has elected to be tried by a district court-martial. The application (like the charge sheet) must be signed by the officer in actual command of the unit to which the accused belongs.

CHAPTER V

POWERS OF COMMANDING OFFICER

38. THE COMMANDING OFFICER. 39. HIS JURISDICTION. 40. DETENTION UP TO TWENTY-EIGHT DAYS. 41. FIELD PUNISHMENT. 42. FINES FOR DRUNKENNESS—Combined Offences—N.C. Officers. 43. FORFEITURE OF PAY. 44. FORFEITURE OF G.C. Badges. 45. STOPPAGES. 46. MINOR PUNISHMENTS. 47. COMBINED PUNISHMENTS. 48. PUNISHMENTS OF NON-COMMISSIONED OFFICERS—No Minor Punishments—Resignation of Rank—Report on Conviction. 49. WARRANT OFFICERS. 50. AWARDING PUNISHMENT—Illegal Award. 51. TRIAL BY COURT-MARTIAL. 52. ONLY ONE TRIAL. 53. POWER OF COMPANY OFFICERS. 54. OFFICERS ON DETACHMENT.

38. THE COMMANDING OFFICER.—A commanding officer, in the ordinary sense of the word, means an officer whose duty it is, in accordance with the usual custom of the service, to deal with offences and either dispose of them on his own authority or refer the cases to superior authority. R. 129 K. 456

It includes also the officer commanding a squadron, company, troop, or battery so far as it relates to the summary award of any punishment authorised to be given by him, and so far as it relates to a summary finding in a case of absence without leave.

In cases to which the above definition does not apply, it must depend on the custom of the service and the King's Regulations as to who is, under any given circumstances, the commanding officer for a particular purpose. M. xi 11

39. HIS JURISDICTION.—Under the Army Act any K. 547
commanding officer or any court-martial can deal. M. v 1
with any offence. It is not intended, however, that
serious offences should be tried by the minor courts,
and hence their jurisdiction and powers of punish-
ment are limited, and restrictions are placed in the K. 487
way of the commanding officer dealing with the more
serious offences unless he obtains the sanction of
superior authority.

A C.O. may refer a charge for any offence to superior R. 4
authority with an application for a district court-
martial, but the offence of drunkenness by a private S. 46
soldier *must* in certain cases be disposed of summarily.

The following offences mentioned in the Act can be K. 487
summarily punished by the commanding officer, or be
tried by a regimental court-martial convened by him,
without reference to superior authority :—

1. Offences in respect of military service punish- S. 6
able more severely on active service than at other
times (except on active service).

2. Using threatening or insubordinate language to S. 8 (2)
a superior officer (except on active service).

3. Disobeying a lawful command of a superior S. 9 (2)
officer (except on active service).

4. Resisting against lawful custody, or breaking S. 10 (2)
out of barracks. (3) (4)

5. Neglect of standing orders. S. 11

6. Assisting or conniving at desertion. S. 14

7. Absence without leave, or from parade or school, S. 15
or being found out of bounds.

8. Malingering or misconduct in hospital. S. 18 (1) (3)

9. Drunkenness. S. 19

10. Permitting escape of a prisoner (except if wil- S. 20
fully done).

11. Irregularity in detaining and reporting a pris- S. 21
oner.

12. Escaping from lawful custody. S. 22

13. Making away with or losing by neglect arms, S. 24
ammunition, clothing, equipment, or necessaries, or
making away with military decorations.

14. Wilfully injuring the property of an officer, S. 24
soldier, regimental institution or the public, or ill-
treating a Government horse.

15. Making a false statement in order to prolong S. 27
a furlough. (4)

16. Making a false statement on attestation (except S. 33
in the case of enlisting from Army Reserve).

17. Infringing the enlistment regulations. S. 34

18. Conduct to the prejudice of good order and 191
military discipline. (Under this heading would fall S. 40
the majority of the minor military and civil offences
committed by a soldier.)

First and less serious offences under the above sec- K. 487
tions, and minor neglects or omissions, not resulting
from contumacious or deliberate disregard of
authority, or not associated with graver offences,
should, as a rule, be dealt with summarily.

A charge for any other offence which the command-
ing officer desires to dispose of summarily will be
referred to superior authority by a letter briefly stat-
ing the circumstances of the case, and accompanied
by the soldier's company conduct sheets.

A commanding officer may, subject to the soldier's
right to elect, previous to the award, to be tried by
D.C.M., inflict the following summary punishments on
a private soldier :—

40. DETENTION UP TO TWENTY-EIGHT DAYS. K. 493

But the power of awarding detention exceeding seven S. 46
days, *except in cases of absence without leave*, will 178
not be exercised by a commanding officer under the
rank of field officer.

In the case of absence without leave exceeding seven
days the detention may be extended to the same
number of days as the days of absence, not exceeding
28 days in the whole, but if the absence does not exceed
seven days, detention can only be awarded up to
seven days.

When detention exceeding seven days is awarded, K. 494
a minor punishment must not be given in addition.
This does not, however, prevent an additional sum-

mary punishment affecting pay being given, such as a fine or deduction from ordinary pay.

Ex. A man may be charged with absence for ten days. For this offence he may receive any number of hours' detention up to 168 hours (with or without confinement to barracks), or he may be given eight to ten days' detention. If he returns drunk (and he is liable to a fine) he may in addition be fined for the drunkenness according to scale.

Any award of detention (*by C.O.*), up to seven days inclusive, will be in hours (168); if exceeding seven days, in days. K. 494

The term of detention, when awarded in days, is reckoned from the first minute of the day of award; when in hours, from the hour at which the soldier is received into the detention barrack, or, if the soldier has not been sooner received, not later than twenty-four hours after the usual hour of committal on the day of the award. If not committed to a detention barrack at all, the detention begins to run from the usual hour of commitment on the day of award. R. 6
R. 135

41. FIELD PUNISHMENT.—On active service a private soldier may be awarded field punishment for any period not exceeding twenty-eight days, and may in addition to or without any other punishment be ordered to forfeit all ordinary pay for a period not exceeding twenty-eight days. A conjoint award of the above will only be effective when the period of forfeiture of pay exceeds the period of field punishment as pay is forfeited for every day of field punishment awarded. For an offence committed in the United Kingdom the award is limited to Field Punishment No. 2 (*d*). S. 46
K. 494
S. 135
A.O. 346
(14)
220 (15)

42. FINES FOR DRUNKENNESS.—Where the charge is against a soldier for drunkenness the C.O. shall deal with the case summarily unless the offence was committed on active service, or on duty, or after the offender was warned for duty, or unless by reason of the drunkenness the offender was found unfit for duty or unless the soldier has been guilty of drunken- S. 46
184

ness on not less than four occasions in the preceding twelve months. Nothing in the above section shall affect the jurisdiction of a court-martial or the right of a soldier to be tried by a district court-martial.

Drunkenness on duty includes drunkenness on K. 510
parade and on the line of march.

A commanding officer in dealing summarily with K. 493
a case of drunkenness must always impose a fine when the soldier is liable thereto; as the award, when prescribed by the scale, is compulsory (except when unpaid fines amount to 20s.).

In computing fines observe the following rules:— K. 512

I. For the first instance during a soldier's service, no fine.

II. (a) For the second offence, 2s. 6d.

(b) For the third and every subsequent offence, 5s., but if the third or subsequent offence occurs within six months of the preceding offence, 7s. 6d., and if within three months, 10s.

Time during which a soldier is absent from duty by reason of imprisonment, detention, or absence without leave is not to be reckoned in the above periods.

III. On mobilization, or when men are re-transferred to the colours from the reserve, cases of drunkenness recorded against them before transfer to the reserve will not be taken into account in computing the fines for further instances of that offence after they rejoin the colours.

Every instance of drunkenness entails an entry in K. 1919
the regimental conduct sheets.

Detention should never be awarded for an instance K. 497
of drunkenness not triable by court-martial except when the amount of unpaid fine is 20s. and upwards, in which case a C.O. should substitute detention or such other punishment which it is in his power to award.

In dealing with *simple* drunkenness, unconnected with another offence, confinement to barracks should

only be added to a fine when the circumstances are such as to increase its gravity.

Combined Offences.—When a soldier commits the K. 511 offence of *simple* drunkenness in connection with a more serious offence for which he is to be tried by court-martial, he should not be charged with the drunkenness before the court-martial unless he is liable to trial and the C.O. thinks it a case that should be tried.

When a charge of drunkenness in such cases is not preferred before the court-martial, the commanding officer will make an entry of the offence, either imposing a fine, if the soldier is liable thereto, or making the following note in the punishment column: 'No punishment; awaiting trial on another charge.' If an entry of the court-martial is subsequently made, the above entry will be bracketed with it.

Non-commissioned officers.—The obligation on a S. 183 commanding officer to deal summarily with a soldier S. 46 charged with drunkenness does not apply to a non-commissioned officer charged with drunkenness.

43. **FORFEITURE OF PAY FOR ABSENCE WITH- P.W.
OUT LEAVE.**—A soldier forfeits his pay for every 978 day he is absent without leave. The following rules S. 140 apply to cases of short absence.

In computing time for the purpose of forfeiture of pay act on the following data:—

(1) Six consecutive hours count as *one day*, whether the absence is wholly in one calendar day, or partly in one calendar day and partly in another.

(2) Twelve consecutive hours count as *two days*, provided that the absence is partly in one calendar day and partly in another.

(3) For absence over twelve hours a soldier forfeits one day's pay for every calendar day during any portion of which he was absent.

For example, a soldier absent from 10 P.M. on Monday to 11 A.M. on Tuesday forfeits two days' pay, but if absent from 9 A.M. on Monday till midnight the same day he only forfeits one day's pay.

A man absent from 11.45 P.M. on Monday till 12.15 A.M. on Wednesday forfeits three days' pay.

It is important to remember that the number of P.W. days' pay which a man forfeits will in no case exceed the number of calendar days during the whole or portion of which he was absent. 979

Thus a soldier forfeits one day's pay for any period of six hours' continuous absence without leave, and where the absence extends over twelve hours he forfeits one day's pay in respect of any day, reckoned from midnight to midnight, during any portion of which he was absent.

The exceptional case must now be considered, P.W. which arises when a man's absence *prevented his fulfilling some military duty which was thrown on another person.* Under these circumstances a day for the purpose of forfeiture of pay is *any period or part, however short*, of an ordinary calendar day; two days is any such period with six hours added to it. 978

For example, a man is absent from duty, which was therefore thrown on another soldier, at 6 P.M. on Monday. If he returns at any time up to midnight he forfeits *one* day's pay, but if he does not come back till 12.30 A.M. on Tuesday he forfeits *two* days' pay, though he may really only have been six hours and a half absent.

Again, a man absent under similar circumstances from 4 to 5 P.M. on Monday forfeits *one* day's pay, and a man absent from 11 P.M. on Monday and returning at 6 A.M. on Tuesday forfeits *two* days' pay.

Before forfeiting the pay of a man in this exceptional case care must be taken that *both* the conditions—(1) that he has been prevented from fulfilling some military duty, and (2) that the duty was therefore thrown on someone else—are fulfilled.

When the absence extends over two days, an offender, as before, necessarily forfeits one day's pay in respect of any day, reckoned from midnight

to midnight, during any portion of which he was absent.

Every offence of absence entailing forfeiture of pay K. 1 is recorded in the regimental conduct sheet, except when the absence does not exceed two days.

- 44. FORFEITURE OF G.C. BADGES.**—One badge held P.W. by a soldier shall be forfeited for each occasion on 1094 which his name appears in the regimental conduct sheet. The earning of G.C. badges and the regaining of them when lost also depends on the absence for a specified time of entries in the conduct sheets.

A commanding officer in awarding punishment must take into consideration the fact that an award entailing a regimental entry carries with it a further punishment to a well-behaved soldier.

- 45. STOPPAGES.**—Stoppages may be awarded by a S. 13 commanding officer to make good expenses caused by a soldier, or any loss, damage, or destruction done by him to any arms, ammunition, equipment, clothing, instruments, regimental necessaries, military decorations, or any buildings or property. Deductions from 51 ordinary pay in the above instances may be ordered in addition to or without any other punishment, and a soldier has a right to elect to be tried by district court-martial, instead of submitting to the award of his commanding officer. (Any deficiency of a soldier's necessaries and personal clothing which may exist at any time has to be made good as a matter of account between him and his captain.)

A soldier in respect of the award of stoppage shall not be subjected to any deduction from his ordinary pay greater than is sufficient to make good the loss or damage. The total amount of the deductions shall not exceed such sum as will leave to the soldier, after paying for his messing and washing, less than one penny a day.

- 46. MINOR PUNISHMENTS.**—Confinement to barracks K. 49 may be awarded for any period not exceeding

fourteen days. Defaulters will be required to answer to their names at uncertain hours during the day, and will be employed on fatigues to the fullest practicable extent. They will attend parades and take all duties in regular turn. If not fully employed on fatigues they may be ordered punishment-drill during the first ten days of the award. Extra guards and piquets may be ordered as a punishment for minor irregularities when on, or parading for, those duties.

A private soldier may be admonished but is not to be reprimanded. The admonition is not entered in the conduct sheet unless it be given in respect of the offence of drunkenness, or in cases entailing forfeiture of pay. K. 493
K. 1924

47. COMBINED PUNISHMENTS.—Field punishment can only be combined with forfeiture of pay, but forfeiture of pay (on active service) and the other punishments may be awarded severally or conjointly, subject to the following provisions :—

When detention exceeding seven days is awarded, a minor punishment must not be given in addition.

When an award includes detention and a minor punishment, the latter will take effect at the termination of the detention awarded.

A soldier undergoing detention or confinement to barracks may for a fresh offence be awarded further punishment, provided that no soldier shall be awarded detention by summary award for more than twenty-eight consecutive days, and that the total consecutive punishment of detention and confinement to barracks shall not exceed forty-two days.

In the case of detention the further punishment will commence from the date of award; in that of a minor punishment from the termination of the previous sentence. The following examples will serve as a guide :—

Private A. on January 1 is sentenced to 14 days' C.B. 40
 On January 5 a further award is made of 48 hours' D. K. 63
 and 7 days' C.B. The D. takes effect from 2 p.m. on K. 65
 the day of award or at latest 24 hours later. The C.B.
 terminates at midnight on the 21st instant. Private B.
 on March 1 is sentenced to 14 days' C.B. On March 11
 a further award is made of 168 hours' D. and 7 days'
 C.B. The D. takes effect as in last example, and the
 C.B. expires at midnight on the 24th or 25th instant.

Private C. on May 1 is sentenced to 10 days' D.
 On May 5 a further award of 10 days' D. is given. The
 soldier will be released at 2 p.m. on the 14th, and be
 confined to barracks for the rest of the day.

Private D. is sentenced to fourteen days' C.B.
 on June 1. On June 8 he is awarded forty-eight
 hours D. After completing the detention the soldier
 is confined to barracks up to midnight on June 14.

48. PUNISHMENT OF NON-COMMISSIONED OFFI- K. 43
 CERS.—When an offence is of such a nature as to K. 49
 require *admonition* only, it should not be entered in K. 19
 the conduct book, except in cases involving forfei-
 ture of pay. A non-commissioned officer is in a
 position of trust, and if he shows himself unworthy
 of it by committing a serious offence he should be
 warned as to his conduct, or, if that is insufficient,
 should be deprived of his post. In accordance with
 this view a commanding officer may otherwise treat
 the case by :—

(a) *Reprimand or severe reprimand.*

(b) *Deprivation of acting or lance rank* (whether paid K. 49
 or not), but no summary or minor punishment is to S. 183
 be added.

(c) *Deprivation of a position of the nature of an* K. 302
appointment.—The sanction of an officer not below
 the rank of brigadier-general must be obtained if the
 soldier's permanent rank is higher than that of cor-
 poral. On removal from an appointment a soldier
 will revert to the ordinary duty of his permanent
 rank, remaining supernumerary until absorbed in the

first vacancy. When a non-commissioned officer, who has been removed from his appointment, is not in every respect qualified to perform the duties of his permanent rank, application may be made to the War Office for his reduction to a lower rank.

No minor punishments.—Non-commissioned officers K. 499 are not to be subjected to summary or minor punishments, nor to be punished by being placed at the bottom of the list of their rank, nor in any lower position therein than that they occupy.

Stopping leave or not recommending for promotion, or altering the ordinary roster for the purpose of giving additional guards or piquets for instructional purposes, are not recorded as punishments.

Resignation of rank.—Non-commissioned officers K. 301 may, with the permission of the commanding officer, resign their rank and revert to the rank or position they may have previously held, but are not allowed to do so in order to escape trial by court-martial without sanction from an officer not below the rank of brigadier-general.

Report on Conviction.—When a non-commissioned K. 506 officer is convicted of an offence by the civil power, the case is to be reported to an officer not below the rank of brigadier-general, with a view to obtaining the authority of the Army Council for the reduction of S.183 the offender, if such a course should be thought necessary.

49. WARRANT OFFICERS and persons subject to mili- S. 182
tary law who do not belong to His Majesty's forces S. 184
cannot be punished by a commanding officer or tried
by a regimental court-martial.

50. AWARDING PUNISHMENT.—A punishment is M.iv 36
deemed to be awarded when a soldier is marched
outside the orderly-room or out of the immediate
presence of the punishing officer.

When an award is once given it cannot be increased R. 6

for the same offence, although it may be mitigated R. 7
or remitted, nor can the soldier be recalled for the
purpose of remanding him for a court-martial. If,
however, a commanding officer inflicts an unsuit-
able punishment through a *misapprehension of the*
facts of the case, the award would not be a bar to
future proceedings.

In awarding punishment a commanding officer
must think of the subsequent effect of his award.
This will depend mainly on whether the punishment P.W.
entails a forfeiture of good conduct badges or not. 1094

In dealing with cases of absence without leave, K. 502
regard must be paid to the circumstances of the
absence, and the manner in which the soldier came
back. The absence terminates when the soldier is
taken into custody, and any delay in disposing of the 177
case must be made allowance for in awarding pun-
ishment. Cases of absence over twenty-one days
would generally be tried by court-martial.

Illegal award.—If it appears to an officer not below K. 507
the rank of brigadier-general that the summary
award of a C.O. is illegal or excessive, he may, at
his discretion, within two years of the date of the
award, direct either that it be cancelled and the
entry in the conduct sheet expunged, or that the
punishment be reduced.

51. TRIAL BY COURT-MARTIAL.—When a command- S. 46
ing officer, after hearing the evidence, proposes to R. 7
dispose of an offence committed by a private soldier, M. iv
he shall, in every case where the award or the find- 35
ing involves a forfeiture of pay, and in every other
case unless he awards a minor punishment, ask the
soldier charged whether he desires to be dealt with
summarily or to be tried by district court-martial.
Unless there are reasons against the adoption of K. 496
such a course, a soldier may, on the following day,
be given an opportunity of reconsidering his decision
to be tried by court-martial.

If a commanding officer omits to ask the soldier whether he desires to be dealt with summarily or to be tried by a district court-martial, the soldier may, at any time on the same day, before the hour fixed for the commitment and release of prisoners, claim his right to be tried by court-martial. R. 7

When once the accused has elected to be tried on the charge as read out to him from the guard report, it should under no circumstances be added to or increased in gravity. K. 487A

When a soldier elects to be tried by court-martial his commanding officer may, if he thinks the circumstances of that case warrant it, release the accused from arrest pending trial. K. 490

A soldier cannot demand trial by court-martial on the ground that a minor punishment entails forfeiture of good conduct badges, nor can a non-commissioned officer or soldier who is remanded for a regimental court-martial legally claim to be tried by a district court-martial. S. 46

The right to demand trial by district court-martial is restricted to private soldiers.

- 52. ONLY ONE TRIAL.**—An offender who has been acquitted or convicted by a civil court or court-martial, or who has been dealt with summarily by his commanding officer, cannot again be tried by court-martial or punished by his commanding officer for the same offence. S. 46
S. 157
S. 162

This does not, however, prevent a subsequent trial taking place if the offence punished leads to some *other* offence of a more serious character. For instance, a man might be summarily punished for assault, but the fact of his being so punished would not prevent his being tried for an offence of manslaughter which arose directly from the assault.

No conviction by a military court exempts an offender from being subsequently tried for the same offence by a civil court. 61

The fact of a magistrate having refused to deal with an offence is no bar to its trial by a military tribunal.

- 53. POWER OF COMPANY OFFICERS.**—Officers commanding companies may admonish and reprimand (but not severely reprimand) N.C. officers below the rank of sergeant, and may award private soldiers punishment not exceeding seven days' confinement to barracks, extra guards and piquets, and the regulated fines for drunkenness. He may deal with cases of absence without leave, where pay is automatically forfeited, and may award any punishment within his ordinary powers for such absence. In the case of officers of less than 3 years' service the power of award may be limited by the commanding officer to three days' confinement to barracks. The award of punishment is entered in A.F. B. 281, which is obtained from, and returned to, the orderly room. On the last day of the week the form must be signed and will then be attached to the guard report for that day. K. 499
K. 501

K. 485
- 54. OFFICERS ON DETACHMENT.**—The commanding officer of a detachment, if of field rank, has the full powers of a commanding officer of a unit, and if not of field rank has the restricted powers of a commanding officer who has not attained that rank. When the officer commanding a detachment is below the rank of field officer his powers may, having regard to his rank and experience, be restricted to any extent by the commanding officer of the unit from which the detachment is furnished, if it be serving in the same command, or otherwise by the officer commanding the garrison or station. K. 457

In cases of emergency, however, the commanding officer of a detachment who is under the rank of field-officer may exercise his full powers as a commanding officer under field rank, notwithstanding any restrictive order, but in such cases an immediate report of the action taken should be made to the authority by whom the restrictive order was issued.

CHAPTER VI

JURISDICTION OF COURTS-MARTIAL

55. COURTS-MARTIAL—Three Ordinary—One Exceptional. 56. THEIR JURISDICTION. 57. AS TO PLACE—On board Ship—Ship in Commission. 58. AS TO TIME—Exceptional Cases. 59. AS TO OFFENCES—Civil Offences—The Courts used. 60. AS TO OFFENDERS. 61. IN CONFLICT WITH CIVIL LAW. 62. SECOND TRIALS.

55. COURTS-MARTIAL.—When an offence is of a character too serious to be disposed of summarily by a commanding officer, the accused is brought before a court-martial.

Three ordinary.—There are three kinds of courts-martial, which are analogous as regards their power of dealing with offences to the High Courts of the civil law, the Quarter Sessions, and the Petty Sessions. These are :—

- (1) General courts-martial.
- (2) District courts-martial.
- (3) Regimental courts-martial.

One exceptional.—There is besides an exceptional 260 court termed a field general court-martial, which can only be assembled under special circumstances, when it is impracticable to convene an ordinary general court-martial. Its jurisdiction, procedure, and powers of punishment will be dealt with separately.

56. THEIR JURISDICTION.—Military courts are instituted in order to deal with serious offences against

military discipline, committed by persons subject to military law. The maximum punishments which can be inflicted by them are laid down in the Army Act and their powers are otherwise limited in several ways. The jurisdiction of the civil courts when they are regularly administered is only interfered with in the exceptional cases authorised by the Act. 194 59

57. AS TO PLACE.—An offence, irrespective of the place of commission, can be tried anywhere within the jurisdiction of an officer authorised to convene general courts-martial. S. 159

On board ship.—When troops are embarked on board ship they carry with them the military law that exists at the port of embarkation, and courts can be convened and offenders tried in accordance with that law. As soon as the voyage is over they come under the law that holds good at the place of landing, and the confirmation or carrying out of a sentence passed on board ship which has not already been dealt with is finished according to the provisions of that law. Troops on board a transport en route for the seat of war can be considered as on active service. S. 188 S. 189

Ship in commission.—Courts-martial, cannot, however, be held on board ships in commission, with the exception of a regimental court for the trial of a non-commissioned officer. In order to try other cases by court-martial an offender must be transferred to a ship not in commission or the trial must be delayed till a landing on shore can be effected. M. 729 137

58. AS TO TIME.—No person can be tried for an offence if *three years* have passed since its commission, and if the offender has ceased to be subject to military law the trial must take place within *three months* of the date of his ceasing to be so subject. S. 161 S. 158

The limitation as to three months applies especially to men who are discharged or transferred to the S.R.150 T.R.246

reserve, or who constantly change their status from soldier to civilian, as in the case of special reservists and the territorial forces.

A person who is sentenced to penal servitude or imprisonment or detention is subject to military law as long as his sentence lasts, notwithstanding that he has ceased to be subject to military law by reason of his discharge, dismissal, or otherwise. S. 158

Exceptional cases.—The following cases are excepted: 155

(1) Desertion on active service and mutiny can be tried at any time. 161

(2) Desertion (not on active service) and fraudulent enlistment can also be always tried, unless a man has served continuously in an exemplary manner (i.e., had no entry in his regimental conduct sheet) for three years since the commission of the offence. K. 489 S. 161

Certain offences of army reservists, special reservists and men of the territorial force in reference to a failure to comply with orders as to the assembly of these forces, absence without leave, false statements on attestation, and contravention of the enlistment laws, which can be tried by either civil or military courts, can be tried at any time within two months after the offence has become known to the officer who can dispose of it, and, if the offender be not then apprehended, within two months after his apprehension. R.F.A. 26 T.F.A. 25 61 152 174 179 180

59. AS TO OFFENCES.—Courts-martial have the power to punish any military offence and any offence against the civil law which is specially mentioned in the Army Act, such as sedition, assault, theft, damage to property, and offences against enlistment and billeting, etc., subject to certain restrictions as to the power and jurisdiction of the particular court employed.

Civil offences.—They have also power to punish any civil offence punishable by the law of England, subject to the additional limitation that the five crimes of treason, treason-felony, murder, manslaughter, S. 41 192

and rape can *never* be tried in the United Kingdom, and elsewhere, only on active service, or out of His Majesty's dominions, or at Gibraltar or (if within His Majesty's dominions) at any place more than 100 miles from a competent civil court. The above restrictions do not apply to the jurisdiction of field S. 49 general courts-martial, which have power under certain circumstances to try any offence.

The courts used.—Regimental courts-martial should K. 487 only try the offences which can be dealt with summarily by a commanding officer, unless special permission is obtained from superior authority by the commanding officer who convenes the court. 39 37

They can also punish a soldier for a minor *civil offence*, such as assault on a civilian, injury to private property, etc., under Section 40; but in all cases of trial under Section 41 reference must be made K. 487 to a superior. On account of the extensive powers of commanding officers the assembly of regimental courts-martial should be rarely necessary; and for cases not summarily disposed of, a district court-martial should as a rule be convened. 192

District courts-martial have sufficient power of punishment to deal with all ordinary military offences. 126 The higher tribunal of a general court-martial for the trial of soldiers is not resorted to except in cases of very aggravated offences, when, owing to the state of discipline or the bad character of the offender, a severe punishment may be required, and for the trial of all offences committed by officers. K. 552

60. AS TO OFFENDERS.—Any person amenable to military law, whether he belongs to a body of troops or is simply attached to them, can be tried by court-martial, subject to the restrictions that district courts-martial cannot try anyone holding the position of an officer, and that regimental courts-martial cannot try warrant officers, or (in any ordinary case) non-commissioned officers above the rank of corporal S. 47 S. 48 S. 182 S. 184 K. 438

(except on board H.M. ships), or persons not belonging to His Majesty's forces.

Care must be taken that in the trial of marines 10
and persons belonging to His Majesty's Indian Army 18
the provisions of the Naval Discipline Act and the 78
Indian Articles of War are not contravened. 137

61. IN CONFLICT WITH CIVIL LAW.—When a soldier commits an offence against the civil law, he is, as a rule, handed over to that law to be punished. If he is not taken into custody but held to bail he is liable to military duty while so held. A civil court can S. 144 claim to try any man who has committed a crime against civil law punishable by fine or imprisonment, and can order the removal from the army S. 96 under certain conditions of an apprentice under S. 97 twenty-one years of age, or of an indentured labourer, but cannot take a soldier out of the army on account of a fine, debt, or damage under 30*l.*, or for a breach of contract resulting from his enlistment.

No conviction by a military court exempts an S. 162 offender from being subsequently tried by a civil 52 court, but in awarding punishment the court shall have regard to the amount of punishment already S. 46 undergone. On the other hand, a person who has been acquitted or convicted by a civil court or court-martial, or who has been dealt with summarily by a S. 157 commanding officer, cannot again be tried by court- S. 162 martial or punished by a commanding officer for the same offence.

In the case of offences under the Acts dealing with 52 the territorial and reserve forces, which are cognisable 58 by both civil and military law, men of the territorial 152 and reserve forces cannot be tried by civil courts (1) if they have been previously tried for the same offence by court-martial or dealt with summarily by a commanding officer; (2) in the case of a territorial, with- T.R.250 out the consent of his commanding officer or an author- S.R.176 ity superior to him; (3) in the case of a reserve man,

without the consent of an officer who has power to A. R.
direct his trial by court-martial, or some authority
superior to that officer.

62. SECOND TRIALS.—A person who has been ac- S. 157
quitted or convicted of an offence by a court-martial
shall not be liable to be tried again by a court-martial
in respect of that offence.

The principle of law is that a man shall not be S. 157
tried twice in respect of the same offence. The test S. 56
question as to the legality of a second trial is this :
Would the evidence produced on the second trial
have sufficed to obtain a conviction upon the first ?
If so, the second trial is illegal and void. Where on
the second trial the charge is for a different offence,
or the particulars refer to a different set of facts, the
second trial is valid, but an offence of which under
S. 56 the man could have been convicted on the first
trial is not a different offence.

When a court is illegally constituted—as, for S. 157
example, if convened by an officer not authorised to
convene it, or if composed of too few members—*it is*
no court at all, and therefore the accused will not
really have been tried, and may be tried again.

Where a court is originally legally constituted but S. 54
the trial is not completed, by reason of the proceedings
not being confirmed, there has been *no conviction*,
and the accused may be tried again.

But although, as a general principle, the non-con- M. v 5
firmation of a conviction enables a man to be tried R. 56
again, such a course should only be adopted when a
technical irregularity (which cannot be conveniently
amended by revision) causes injustice to the accused
—*e.g.*, if the plea of a soldier to a charge of desertion
is that he was guilty, but intended to return, and this
plea has been recorded as guilty, though amounting
to a plea of not guilty.

In the following exceptional cases a man can
without injustice be tried again by a fresh court : a

court is dissolved before the finding, or, in the case where the finding is guilty, before the sentence, by reason of insufficiency of members, the absence of the president, or the illness of the prisoner; the provisions of R. 37 (D) have not been complied with; a finding of insanity, or a finding in respect of a special plea as to jurisdiction or in bar of trial is not confirmed; the proceedings of a court are lost before confirmation and the authorised substitute for them cannot be obtained.

Where a court-martial is dissolved by reason of insufficiency of members, the absence of the president, or the illness of the accused, it may frequently be inexpedient to convene a new court, especially if the offender has been a long time in arrest or confinement. S. 53

Where a man is retried on the same charges the confirming officer will take care that the punishment awarded is not more severe than that awarded at the first trial. No member should serve on a new trial who sat on the former court. S. 157

A confirming officer who was dissatisfied with the *sentence* of a court-martial would not be justified in refusing to confirm its proceedings, and then assembling another court to try the accused again for the same offence. In no case should an accused be retried on account of the failure of the prosecution in the first trial.

The record of conviction is sometimes removed either before or after promulgation by competent authority, on the ground that the proceedings are illegal or involve substantial injustice to the accused. K. 591 S. 57 R. 126
If the illegality in question has reference to the procedure of the court, or the improper admission of evidence, it does not alter the fact that the accused has been legally convicted by a court which has proper jurisdiction, and hence he cannot be tried again for the same offence. If, however, the proceedings were 140 148 S. 157

annulled on account of the court not having jurisdiction (being illegally convened or being composed of too few members or of officers not competent to try the offender or the offence); the accused could be tried again, as the court was not legal, and hence he has not really been tried at all.

It has been ruled that when a trial is completed by confirmation and promulgation, the accused shall not again be tried by a second court.

In the United Kingdom and elsewhere when the case admits of reference without undue delay the proceedings of courts-martial that have been confirmed will not be quashed without reference to the Judge-Advocate General. K. 591

Where proceedings are confirmed and subsequently quashed by superior authority the accused is not subject to re-trial.

CHAPTER VII

COMPOSITION OF COURTS-MARTIAL

63. COMPOSITION OF COURTS. 64. QUALIFICATIONS OF MEMBERS—Branch of Service—Disqualification. 65. QUALIFICATION OF PRESIDENT—A Combatant Officer. 66. DUTIES OF PRESIDENT—As to Charges—Evidence—Votes—Summoning Witnesses—Clearing Court. 67. FORMATION OF COURTS.

63. COMPOSITION OF COURTS.—Courts-martial are S. 47 composed of a number of commissioned officers, the S. 48 senior of whom is termed the president. To each R. 19 court is assigned a legal minimum of officers, and each member must have held a commission for a specified period :—

Numbers of members in			
United Kingdom, India,	G.C.M.	D.C.M.	R.C.M.
Malta, and Gibraltar			
Number of members else-}			
where }	5	3	3
Minimum length of mem-}			
bers' service in years . }	3	2	1

An officer is not to be detailed to sit on a court- K. 572
martial unless he is, in the opinion of his command-
ing officer, competent, nor, when it can be avoided,
unless he has previously attended as a supernumerary
at least twenty-five times.

For the trial of doubtful or complicated cases a K. 576
district court-martial should consist of five or more
officers, and waiting members should be detailed if

necessary. When composed of three members, not more than one is to be a subaltern.

On a general court-martial two or four additional members should be provided, as well as waiting members, and five at least of the members must be not below the rank of captain. R. 21

64. **QUALIFICATIONS OF MEMBERS.**—A member is not *eligible* to serve on a court-martial unless he is a commissioned officer of sufficient rank and service as above, and is subject to military law. Members may belong to the same or different corps, and a regimental court-martial need not necessarily be composed of officers of one regiment. General and district courts-martial should, however, if practicable, be formed of officers of different corps, and should never be composed of officers of the same regiment of cavalry or battalion of infantry or brigade of artillery or in the case of garrison artillery of officers in the same lieutenant-colonel's command, unless the impossibility of procuring other officers is stated in the order convening the court. S. 50 R. 19 R. 20

Rank.—Members of a court-martial for the trial of an officer should be of equal, if not superior, rank to that officer. R. 21

For the trial of a commanding officer as many members as possible should have held a similar position. K. 578

For the trial of a subaltern not more than two officers of subaltern rank should be detailed as members of the court.

A subaltern can in no case sit on a court for the trial of a field officer. S. 48

Branch of service.—Officers of marines when subject to military law and British officers of His Majesty's Indian forces can sit on courts-martial; but officers of the Navy cannot, as they are not under the Army Act. S. 179 S. 180 S. 175 S. 190 (8)

Officers of the special reserve of officers, of special reserve units and of the territorial forces, can sit with officers of the regular forces to try offenders irre- S. 178

spective of whether they belong to the regular forces or not.

When trying an accused person belonging to the special reserve or to the territorial forces, at least one member should, if practicable, belong to those forces, and to the same branch as that to which the accused belongs. A regular officer who is adjutant of a special reserve unit or of a territorial unit is not considered an officer of those corps for the purposes of this rule. R. 20

There is no regulation against officers holding honorary commissions or non-combatant officers sitting as members of a court provided they are otherwise qualified.

Disqualification.—An officer is *disqualified* from serving on a court-martial if he is the convening or investigating* officer, the prosecutor or witness for the prosecution, the commanding officer of the accused, or of his corps, a member of a court of inquiry respecting the matters on which the charges against the accused are founded, or an officer who has a personal interest in the case. S. 50 R. 19 M. 679

65. QUALIFICATION OF PRESIDENT.—A president must, of course, be qualified as a member, but in addition he must have a rank suitable to the dignity of the court over which he presides.

The president is always appointed by name, and after the court is sworn cannot be displaced, even although promotion or accidental circumstances may cause a member to be senior to him in rank. K. 577

The president of a general court-martial should be a general officer or a colonel if available, otherwise a field officer, but in no case an officer under the rank of captain. K. 578 S. 48

To a district court-martial a field officer should be appointed if available, otherwise a captain, and when K. 558 S. 48

* The term includes the officer who takes down the summary of evidence, and the company commander who makes the preliminary inquiry.

an officer of the rank of captain is not available the power of convening the court should not be exercised except when such a course is absolutely necessary. S. 47

The president of a regimental court-martial should not be under the rank of captain, except on the line of march, on board ship, or when a captain is, with due regard to the public service, not available.

When an officer of proper rank (captain for regimental and field officer for the higher courts) cannot be obtained, the fact must be stated in the order convening the court.

The president of a court for the trial of a warrant officer must in no case be under the rank of captain. S. 182

Non-combatant officers.—A departmental officer serving in his department, whether on his combatant or other commission, and an officer holding honorary rank, is not entitled to the presidency of courts-martial, but still he is legally qualified if duly appointed. In practice, however, a combatant officer is always appointed, except in the case of regimental courts-martial in the army medical service, Indian medical service and army veterinary service, in which case an officer of those corps may be appointed. K. 230 M. v 14

- 66. DUTIES OF PRESIDENT.**—The president is necessarily the senior officer, and is responsible that the trial is conducted with due decorum, and in a manner befitting a court of justice. It is his duty to see that justice is administered, and that the accused has a fair trial and does not suffer any disadvantage from his not fully understanding the nature of the proceedings or his inability to properly examine the witnesses. R. 59

He is responsible that the members are present and seated according to rank, that the usual books and documents are on the table, and that proper inquiries are made by the court as to its legal constitution, the amenability to trial of the accused, and the validity of the charge. 82 84 R. 22 R. 23

The president is the mouthpiece of the court, reads out all orders and charges, and is the channel of communication by which its decision or opinion is made known.

Like the judge of a civil court he should act as counsel for an accused not defended by counsel. He will therefore cause to be called before the court any witness whom he considers able to give material evidence, but he has no power to call the accused as a witness. He administers the oath to the members of the court, writes the proceedings or directs a member of the court to do so, and is responsible for the accuracy of the record of the proceedings, and also for their safe custody and transmission to proper authority.

The record of the proceedings must be written in a clear and legible hand, without erasures. Interlineations or corrections should be avoided if possible, but if made they should be verified by the president's initials.

The termination of the proceedings, whether the last act be the finding or the sentence, must be signed and dated by the president.

As to charges.—The president has the original charge sheet and summary or abstract of evidence sent to him before the court assembles, and if he thinks any amendment in the charges is required he should communicate with the convening officer.

Evidence.—He will examine the summary of evidence, and if a witness gives different evidence from what is there recorded will question him as to the difference. He will also put to witnesses (including the accused if he gives evidence) any questions which appear to him necessary or desirable to elicit the truth. In particular he should put questions to the accused (if he gives evidence) for the purpose of enabling him to explain any facts appearing in the evidence for the prosecution; but he must not cross-examine the accused, and should not put questions to him with a view to supplement the evidence for the prosecution.

All interpolated or extra questions put to a witness, by leave of the court, must be put through the president. R. 85 R. 86

Votes.—The president collects the votes of the members, commencing with the junior in rank. He has a casting vote in every case of an equality of opinions after the commencement of the trial (*i.e.*, after the arraignment of the accused) except as to the *finding* and a sentence of death. S. 53 R. 69 116 127

In cases which may arise before the trial has commenced, such as that of challenge of members, he has no casting vote. S. 51

Summoning witnesses.—The president, *after* the court has assembled, takes the proper steps to procure the attendance of any witnesses that may be wanted and have not before been summoned or ordered to attend. Witnesses not subject to military law can also be summoned by him prior to the assembly of the court. R. 78

Clearing court.—The president can order the court to be cleared at any time for the purposes of deliberation, and no person can remain present except the members of the court, the judge-advocate, and officers under instruction. A court, if more convenient, may retire from the place where they are sitting and assemble elsewhere. S. 53 R. 63

- 67. FORMATION OF COURTS.** In the order convening a court-martial the president is appointed by name. The members and waiting members may be mentioned by name, or the number and ranks and the unit to which they belong may alone be named. The name of the judge-advocate (if any) who has been appointed is also recorded. K. 577

The selection of the prosecutor is subject to the approval of the convening officer, and the accused has no right to object to him or to the judge-advocate, as they do not form part of the court. R. 24 R. 25

If before the accused is arraigned the full number R. 18

of officers detailed to form the court are from any cause not available to serve, and if there are not sufficient officers in waiting to take their places, the court should ordinarily adjourn for the purpose of fresh members being appointed ; but if the court are of opinion that in the interests of justice it is inexpedient to adjourn, they may, if not reduced in number below the legal minimum, proceed, recording their reasons for so doing.

The nature and formation of a court is in some cases 60 affected by the status of the accused, *e.g.*, a general court-martial alone can try an officer, while a regimental court-martial cannot try a warrant officer or a person subject to military law, but not belonging to H.M. Forces. Again, the rank and position of the 64 officers forming a court are regulated by the status of 65 the accused as a field officer, a commanding officer, a subaltern, a warrant officer or a member of the special reserve or territorial forces.

CHAPTER VIII

THE PROSECUTOR AND JUDGE-ADVOCATE

68. THE PROSECUTOR—Swearing of—Absence of—Objection to—Privileges of—As Witness.

69. DUTIES OF PROSECUTOR. 70. COUNSEL AS PROSECUTOR. 71. JUDGE-ADVOCATE—Disqualification of—Swearing of—Absence of—Objection to—Presence in Closed Court—As Witness. 72.

CIVILIAN JUDGE-ADVOCATE. 73. DUTIES OF JUDGE-ADVOCATE—Summing up—Summoning Witnesses—Examining Witnesses—Recording Proceedings—Custody and Transmission of Proceedings. 74. JUDGE-ADVOCATE GENERAL'S DEPARTMENT—Care of Proceedings.

68. THE PROSECUTOR.—On all trials where a counsel R. 24 does not appear a person subject to military law and approved of by the convening officer is appointed to prosecute. It is the usual custom that the prosecutor should be a commissioned officer, and K. 573 in ordinary cases the adjutant of the corps of the accused or the commander of his company is told off to the duty. In complicated cases, and for trials by general courts-martial, the convening officer will select a specially qualified officer. A non-commissioned officer could act as prosecutor, if an officer is not available, in cases where the production of documents only is necessary.

The convening officer must not appoint himself as S. 50 prosecutor, and the prosecutor must not be a member of the court, nor act as judge-advocate, nor can he confirm the proceedings.

The prosecutor appears before the court in his R. 24 legal capacity when the accused is first brought in. M. v. 41

He may, however, be present at the preliminary proceedings, as a court-martial is essentially an open court.

Swearing of.—The prosecutor is not sworn unless called upon to give evidence as a witness.

Absence of.—The absence of the prosecutor at any stage of the proceedings does not affect their legality.

Objection to.—The accused cannot object to the prosecutor, as he does not form a part of the court. R. 25

Privileges of.—In order to properly carry out his duties the prosecutor should have a copy of, or at all events access to, the charges and summary of evidence a reasonable time before the court sits. M. iv 30

The prosecutor is entitled to have the opinion of the judge-advocate on any point of law. R. 103

As witness.—A prosecutor should not, if possible, be called upon to give evidence for the prosecution; but if such a course is occasionally necessary on active service or to prove formal matter or produce documents he should give his evidence before that of any other witness, and care should be taken that his sworn statement as a witness should be kept quite distinct from any statements made by him in his address as prosecutor. A prosecutor must not be allowed to swear that the matters referred to in his address are *as a whole* true. There is no objection to a prosecutor being called on as a witness for the defence. R. 234 R. 39 R. 77

69. DUTIES OF PROSECUTOR.—It is the duty of a prosecutor to prove every essential part of his case by sworn evidence. At the same time he has to assist the court in the administration of justice and to behave impartially. He is an official whose duty it is to see that justice is done, and not a partisan whose object is to convict the accused. He should call witnesses to prove the charges irrespective of whether they are favourably inclined to the accused or not, and he must be careful not to omit taking evidence which may show the innocence of the accused or extenuate his crime. R. 60 K. 575

He must take care not to bring forward evidence which is not relevant to the charge, and which may tend to prejudice the accused with the court, while all facts which tend to make the case clear should be entered into. He must not comment on the fact that the accused has not applied to give evidence himself, but he would be justified in pointing out that the accused did not give his evidence until after he had heard the evidence of his own witnesses. If the charges against a soldier do not allege drunkenness, and he was drunk when he committed the offence, the fact should be brought out in evidence.

R. 40

R. 41

K. 575

In cases of alleged desertion, the fact of the soldier having surrendered or been apprehended is material to the issue, and should be proved by the prosecutor.

R. 46

In cases where the evidence is at all complicated every particular essential to constitute the offence charged should be proved step by step; *e.g.*, on a charge of making false accusations it is desirable to prove in regular stages (1) that the accusation was made by the accused, (2) that it was false, (3) that the accused made it knowing it was false.

R. 39

If the accused has elected to be tried instead of submitting to a summary award of his commanding officer, the prosecutor will inform the court before arraignment takes place.

App. II

The prosecutor examines his own witnesses and cross-examines those of the accused, and explains his case by means of addresses if necessary. On him would usually fall the duty of warning the accused for trial.

99

R. 14

81

Where the finding of a court renders the accused liable to any exceptional punishment, such as forfeiture or reduction of corps pay, in addition to that to be awarded by the court, it will be the duty of the prosecutor to inform the members of the fact.

R. 46

70. COUNSEL AS PROSECUTOR.—A properly qualified counsel can appear on behalf of the prosecutor at

R. 88

103

general and district courts-martial, and such counsel shall assume the position of prosecutor, with all its advantages and disadvantages. R. 574

When counsel appears on behalf of the prosecutor, the prosecutor, if called as a witness, may be examined and re-examined as any other witness. R. 89

71. JUDGE-ADVOCATE.—Officers authorised to convene general courts-martial out of the United Kingdom are by the terms of their warrants authorised to appoint judge-advocates to attend court-martial. 79

Judge-advocates must always be present at general courts-martial, and may, if deemed expedient (in cases where the evidence is complicated), be ordered to attend district courts. R. 101

When the trial takes place at home, the deputy judge-advocate or his assistant (who are barristers) is sometimes ordered to attend by the judge-advocate general. The judge-advocate general may, however, if he thinks proper, depute any qualified officer that the convening officer may recommend to officiate as judge-advocate at a trial.

In the case of a trial abroad a fit person is appointed by the officer convening the court. The proceedings of a court-martial are not invalid owing to any irregularity in the manner of appointing a judge-advocate, provided he is a fit person. R. 101

The judge-advocate must be present when the court assembles, and it will be one of the first duties of the court to see that he is duly appointed. R. 22

Disqualification of.—An officer who is disqualified to sit on a court-martial as a member cannot act as judge-advocate. R. 101 64

Swearing of.—A judge-advocate is duly sworn at the same time as the rest of the court (see Form of Oath). R. 27

Absence of.—When a judge-advocate has been appointed, the court cannot proceed unless he is present. R. 65
If a judge-advocate falls ill or is unable to attend, the

court shall adjourn, and a fit person may be appointed to replace him during the remainder of the trial. Care must be taken that the substitute is duly sworn.

Objection to.—The judge-advocate, if properly appointed, cannot be objected to by the accused, as he does not form a part of the court. R. 25

Presence in closed court.—The judge-advocate remains present when the court is closed for deliberation. R. 63

As witness.—He can be called on as a witness for the defence, but not for the prosecution. S. 50 R. 77

- 72. CIVILIAN JUDGE-ADVOCATE.**—The deputy judge-advocate (who is qualified as counsel) or a counsel selected by the judge-advocate general may be appointed to act as judge-advocate in trials held at home, but such person must not be the prosecutor or witness for the prosecution, and should be free from all suspicion of bias or prejudice. R. 89 103 S. 50 R. 101

When it is deemed expedient to call in the aid of counsel in the case of trials abroad it is more desirable that he should assist the military judge-advocate than that he should replace him.

- 73. DUTIES OF JUDGE-ADVOCATE.**—At a court-martial the judge-advocate represents the judge-advocate general, and should maintain an entirely impartial position as the legal adviser of all parties connected with the trial. He should inform the convening officer and court of any defect in the charge or any informality in the constitution of the court. R. 103

He is responsible for informing the court as to any want of legality and formality of the proceedings, and the court should be guided by his opinion on any point of law or procedure that arises during the trial.

The court itself is responsible for the legality of its proceedings, but must consider the grave consequences which may result from disregard of advice given them on legal points.

Any information or advice given by the judge-advocate to the court must, if he or they wish it, be entered in the proceedings.

The judge-advocate, equally with the president, must take care that the accused does not suffer any disadvantage in consequence of his ignorance or inability to examine witnesses, and, to elicit the truth, he may, with permission of the court, call witnesses or put questions to witnesses as he thinks fit. R. 59 R. 103

It is part of his duty to swear in the court and administer oaths and declarations to witnesses. R. 26 R. 82

Both the prosecutor and the accused are entitled to ask the opinion of the judge-advocate on any question of law that is relative to the trial.

Summing up.—After the conclusion of the case the judge-advocate will sum it up, unless he and the court think a summing up unnecessary, and after his summing up no further address is allowed. R. 42

In his summing-up he may comment on the fact that the accused did not apply to give evidence himself, or on the fact that he chose to give evidence after hearing the evidence of other witnesses for the defence.

The summing-up, if in writing, is attached to the proceedings, and, if not in writing, such *précis* of it as the judge-advocate thinks necessary is recorded. R. 95

Summoning witnesses.—The judge-advocate has the power of summoning witnesses not subject to military law, but it is rarely exercised at home, it being more convenient to leave such matters to the convening officer or president. R. 78

Examining witnesses.—The judge-advocate can examine and cross-examine witnesses in the usual way, or may ask questions through the president. R. 83 R. 85

Recording proceedings.—The judge-advocate is responsible for a proper record of the proceedings in writing, and in important cases may have the assistance of a sworn shorthand writer. R. 95 R. 72

Reporters are allowed to be present and take notes M. v 71

as long as the court is open. It is not usual to place any restrictions on them, but the court has a right to forbid any publication of its proceedings till after the close of the trial.

Custody of proceedings.—As long as the court sits R. 96 the custody of the proceedings is in charge of the judge-advocate, and they may be inspected by the prosecutor, the accused and the members of the court at any time up to the finding.

He should sign the proceedings after the president R. 45 has done so, take charge of them, and forward them R. 50 to the proper authority.

Transmission of proceedings.—If held in the United 134 Kingdom, the proceedings of general courts-martial K. 592 are to be forwarded to the judge-advocate general for confirmation by His Majesty ; if held abroad, to the general or other officer who has power to confirm the proceedings, who, if he has not the power to confirm will forward them to the Judge-Advocate General. District courts-martial are forwarded to the officer specified in the order convening the court or R. 97 in default of such direction to the confirming officer. The proceedings of regimental courts-martial are sent to the confirming officer.

The proceedings of any general or district court- K. 595 martial which have not resulted in a conviction, or for any reason have not been confirmed, will be sent to the judge-advocate general.

After confirmation the proceedings of all general and district courts-martial are forwarded to the judge-advocate general.

74. JUDGE-ADVOCATE GENERAL'S DEPARTMENT. M. ix

—The judge-advocate general is now a permanent 58 official acting as legal adviser to the Secretary of State ; he is no longer a Privy Councillor, nor does he advise the Crown directly.

In the case of general courts-martial in the United R. 17 Kingdom the charge, summary of evidence and list R. 101

of members forming the court (as well as the officer recommended for judge-advocate) should be submitted M. 705 to him, and he appoints the judge-advocate to the court and advises the Secretary of State as to these and other general courts-martial, which are forwarded for confirmation by His Majesty. In cases of fraud (other than simple theft) the charge and summary of evidence S. 17 should be submitted for his approval before trial is ordered.

The deputy judge-advocate is a barrister who may be required to attend courts-martial at home, as the representative of the judge-advocate general.

The judge-advocate general's department carefully inspects the proceedings of the general, field-general, and district courts-martial, brought before it, and if any illegality has taken place, brings it to the notice of the confirming or superior officer, who has the power to amend the fault in question.

In the case of the marines the judge-advocate S. 179 general's department is represented by the Admiralty.

Care of proceedings.—The proceedings of general R. 98 courts-martial are kept in the judge-advocate general's department for seven years, and those of S. 124 district and field-general courts-martial for three R. 99 years. Copies of the proceedings can be obtained on S. 165 payment by the person tried, and a certified copy is admissible in evidence.

CHAPTER IX

ASSEMBLY OF COURTS-MARTIAL

75. PRELIMINARY PROCEEDINGS. 76. APPLICATION FOR COURT-MARTIAL. 77. DELAY IN ASSEMBLY. 78. CONVENING AUTHORITY. 79. WARRANTS—Delegated Warrants. 80. DUTY OF CONVENING OFFICER—Charges—Summary or Abstract of Evidence—Witnesses—Nature of Court—Order Assembling Court—Appointing Officers. 81. WARNING THE ACCUSED. 82. ASSEMBLY OF COURT—Seating of Members—Preliminaries. 83. HOUR OF SITTING. 84. LEGAL INQUIRIES BY COURT. 85. THE ACCUSED.
- 75. PRELIMINARY PROCEEDINGS.**—After completing the investigation of a charge against a soldier in the prescribed manner, a commanding officer, if he does not dispose of the case summarily, must, without unnecessary delay, which should not exceed thirty-six hours, either refer the case to superior authority, order a regimental court-martial to assemble, or apply to a superior to convene a higher court. R. 4
37
R. 5
- 76. APPLICATION FOR COURT-MARTIAL.**—When making application to a convening officer for a district or general court-martial, the commanding officer forwards with it the charge-sheet, summary of evidence, company conduct sheets, list of witnesses to be called, and a statement as to character and particulars of service of the accused. A surgeon's certificate as to the ability of the accused to undergo imprisonment is appended. The names of the officers who took part in the investigation of the case should be stated in the application, and in the event of the accused having elected to be tried instead of sub- M. v 2
M. 72

mitting to a summary award the fact should be noted M. 703
on the form. The name of the officer who it is proposed
should act as prosecutor must also be stated. 51

77. DELAY IN ASSEMBLY.—A regimental court-martial should as a rule be assembled the day after R. 5
the charge has been investigated, care being taken R. 14
that there be an interval of not less than eighteen R. 16
hours between the warning of the soldier for trial
and his arraignment. The delay in ordering the 81
assembly of a regimental court-martial or in apply-
ing to a superior to convene a court-martial should
not ordinarily exceed thirty-six hours.

In every case where an offender (not on active K. 464
service) remains in military custody for a longer S. 45
period than eight days without a court-martial for R. 1
his trial being ordered to assemble, a special report
must be made by his commanding officer, to the
general, or other convening officer, and a similar re-
port shall be forwarded every eight days until a
court-martial is assembled or the accused is released.
The report will have to be sent by the commanding
officer even though the fault of the delay lies with
the officer to whom the report is to be made.

If a general or district court-martial is not as- R. 17
sembled within fifteen days after the application for
it is received (or within thirty days if out of the
United Kingdom), a report must be made by the con-
vening officer to the Army Council (or if in India to
the C. in Chief) explaining the reasons for the delay.

78. CONVENING AUTHORITY.—A *general* court-martial can be convened by His Majesty, by any S. 122
qualified officer holding a warrant from His Majesty, S. 48
or by an officer to whom power has been delegated by
warrant from the officer originally given authority by
His Majesty. A general court-martial for the trial of S. 179
an officer or soldier of the marines must under ordinary
circumstances be convened by an officer holding a
warrant from the Admiralty.

The convening officer of a general court-martial
must be not below the degree of field officer, except

in rare cases abroad, when a captain may be authorised by a special warrant.

District courts-martial can be convened by any officer authorised to convene general courts-martial, or by an officer who has received a warrant from such an authority. S. 123 S. 48

The convening officer of a district court-martial must not be below the rank of captain, but it is directed that power should not be delegated to an officer below the rank of lieutenant-colonel.

Regimental courts-martial can be convened by any officer authorised to convene the higher courts, by a commanding officer, or officer in command of two or more detachments, provided he be not under the rank of captain, and on board a ship by a commanding officer of any rank. If assembled on board a ship in commission in order to try a non-commissioned officer the permission of the captain of the ship is required. S. 47 57 M. 728

The proper authority to convene a regimental court-martial is the commanding officer of the accused, and officers senior to him who have occasion to order a case to be disposed of by this court should direct the commanding officer to convene it instead of doing so themselves. K. 559

If a commanding officer is unable to form an adequate court from the officers under his command he may apply to another detachment or corps for the officers required. He would usually, however, apply to the general or other senior officer in command to convene a district court-martial. M. v 9 S. 47

Except in the case of a R.C.M. the C.O. of the accused who has investigated the charge or remanded the case for trial cannot afterwards act as convening officer. R. 17

- 79. WARRANTS.**—The warrants above referred to which are now in force are those issued under the sign-manual of the King and signed by the Secretary of M. v 2 M. 728

State, and sent to the Commander-in-Chief in India, general officers commanding in the Colonies, and on active service, and at home to general officers commanding in chief and a few others. Warrants have also been issued to the governors of some of the colonies.

The Commander-in-Chief in India has full powers *M. v 95* to *convene and confirm* general courts-martial. Other general officers abroad have similar powers, subject to the restriction that they must refer for confirmation to the judge-advocate general for His Majesty's decision all sentences on officers (not native) of death, penal servitude, cashiering, and dismissal. Warrants issued to officers abroad authorise the appointment of judge-advocates and provost-marshals. *S. 74*

General officers commanding-in-Chief at home can only *convene* general courts-martial, and must transmit the proceedings to the judge-advocate general.

In the case of an army in the field, its commander would hold a special warrant which would probably empower him to confirm in all cases.

The fact of a warrant having been once issued to the commander of the troops at a foreign station is a sufficient authority to assemble a court-martial at any subsequent time at that station (as the warrants are not personal).

The Admiralty exercise the powers of the Crown *S. 179* in relation to the navy, and therefore in the case of the marines are given powers as to warrants, etc., similar to those vested in His Majesty in relation to the army.

Delegated warrants.—Officers authorised to convene *S. 122* general courts-martial abroad can delegate to an officer under their command, not under the rank of field officer (in exceptional cases abroad a captain, by special warrant), their powers of convening and confirming general courts-martial, subject to the restriction that the sentence on officers before referred to cannot be confirmed by them; officers authorised to convene general courts-martial at

home cannot delegate their power of doing so to anyone else. All officers authorised to convene general courts-martial can convene and confirm district courts-martial, and can delegate their powers of so doing to an officer under their command (not under the rank of captain). S. 123

Delegated warrants are not usually issued in Home Commands to officers under the rank of lieutenant-colonel. When troops are being conveyed from a colony to the seat of war a delegated warrant may be issued to the senior combatant on board ship for the duration of the voyage by the governor of the colony if he holds a general court-martial warrant.

80. DUTY OF CONVENING OFFICER.—The convening officer must satisfy himself that the offender is not exempt from trial, that the charges to be tried are for offences under the Army Act, that they are properly framed, and that the evidence forthcoming is sufficient to justify the trial of the accused. R. 17 K. 567

Charges.—He can use his discretion in revising and amending the charge-sheet, and can strike out minor charges or those upon which he thinks—after perusing the summary of evidence—that sufficient evidence is not forthcoming. If not satisfied that the charges can be legally sustained, he can either order the release of the accused or refer the case to superior authority. K. 568 221 M. v 28

The original charge-sheet and the order for the assembly of the court-martial should be sent to the president of the court-martial, together with the summary or abstract of evidence, and the prosecutor should be either given copies of the charge-sheet and summary or allowed access to the originals. R. 17 M. iv 30

At home stations in all cases of fraud (exclusive of simple theft) the charge and summary of evidence must be submitted to the judge-advocate general before the trial is ordered.

The other documents forwarded with the application for a court-martial will be returned to the corps with the notice of trial.

Witnesses.—The convening officer must arrange R. 78 that any witnesses whose names have been forwarded to him are summoned or ordered to attend, provided their attendance can reasonably be procured.

The person requiring the attendance of a witness may be required to defray the expenses thereby incurred.

Nature of court.—In deciding on the nature of the K. 548 court by which an accused is to be tried the convening officer can either refer the matter to superior authority, order the commanding officer to dispose of the case summarily or by regimental court-martial, or convene a general or district court-martial if he has the power to do so. In fixing on the particular K. 552 court the convening officer must keep in mind the nature of the offence, the character of the accused, the state of discipline at the time and place the offence was committed, and the particular circumstances of the case. There are but few crimes which cannot be effectually dealt with by district courts-martial, and the higher tribunal of a general court-martial should be reserved for cases of very aggravated offences requiring a severe punishment.

In the case of general courts-martial at home stations the constitution of the court, the charge and the summary of evidence are to be submitted for the approval of the judge-advocate general. M. 705

Order assembling court.—The order for the assembly Ap. II. of a particular kind of court-martial for the trial of the accused at a convenient time and place has then to be issued.

The president (and judge-advocate if any) is appointed by name, and the members and waiting members are either mentioned by name, or the number of officers of each rank and regiment to be furnished is stated. An officer, subject to military law, R. 24 is also appointed to act as prosecutor.

The order closes with a notification that the accused are to be warned and witnesses required to attend, and states where the proceedings are to be sent.

Appointing officers.—General and district courts-martial are army courts as contrasted with regimental ones, which usually, though not necessarily, are formed from one corps. No district or general court must be formed from officers of the same regiment of cavalry or battalion of infantry, or the same brigade of artillery, or in the case of the R.G.A. the officers in the same lieutenant-colonel's command, if it is possible to get officers of different corps to sit. R. 20

Application may be made, if necessary, for the services of officers belonging to another command.

In the case of a general court-martial, when a trial is likely to be prolonged, it is usual to appoint two or four members more than the legal minimum, and waiting members should also be detailed to meet the case of reduction by challenge. For district and regimental courts-martial the legal minimum will ordinarily be sufficient, but if necessary a larger number may be detailed and waiting members provided. For the trial of doubtful or complicated cases a district-court-martial should, when possible, consist of five officers. R. 576 67

It must be remembered that no officers can be added to a court after the accused is arraigned, and that a member who is absent while any portion of the evidence is being taken cannot again resume his seat. R. 68

81. **WARNING THE ACCUSED.**—An accused for whose trial a court-martial has been ordered to assemble should be afforded proper opportunities for preparing his defence. As soon as the charges are decided on, a copy of them should be forwarded to him, at least eighteen hours before the assembly of a regimental court-martial, and twenty-four hours before that of a higher court. The charges should be explained to him, if necessary, and he should be asked for the names of his witnesses, and, if he demands it, be informed of the names of the officers who are to form the court, as well as those of officers in waiting. He is also entitled to have given him a true copy of the summary of evidence. Notice must also be R. 13 R. 14 237 R. 15

given him if he is to be tried jointly with other persons, in order that, by notice to the convening authority, he may be able to claim a separate trial. Each accused should also be told that, if he gives evidence himself, and in doing so gives evidence against another person charged with the same offence, he will be liable to be cross-examined as to character. But this liability will not of itself entitle the accused to claim to be tried separately.

Where counsel is to be employed by the prosecution, at least seven days' notice must be given to the accused. R. 89

This notification or *warning* to the accused must be made personally by an officer, who is usually the prosecutor or an officer of the offender's own corps.

When an officer is to be tried, and a summary of evidence has not been taken in his presence, he R. 8

should be furnished by the convening officer with an abstract of the evidence to be adduced, at least twenty-four hours before trial, and, if he demands it, a copy of the proceedings of any court of inquiry that may have investigated the case. R. 124

82. ASSEMBLY OF COURT.—The court assembles at the time and place mentioned in the order convening the court.

Officers attend courts-martial in the following dress :—General courts-martial, review order ; district courts-martial, undress order ; regimental court-martial, drill order. K. 1711

Seating of Members.—The president takes his place at the head of the table and sees that the members are seated according to their rank and seniority, the senior member being placed on his right hand, the next senior on his left and so on.

On district and general courts-martial seats will be taken by army rank, but on a regimental court-martial, where officers of one regiment only are present, by regimental rank. R. 58

If an officer be promoted during trial, he changes his seat according to rank, but he can in no case displace the president, who remains president of the court till it is dissolved.

Preliminaries.—The president sees that all the members and judge-advocate (if any) are present, and that the charge-sheet, summary of evidence, and the usual official books, orders, and papers are on the table, and notes on the proceedings the hour at which the court opens. R. 59

83. HOUR OF SITTING.—Courts-martial can sit at any time between six and six, on any day except Sunday, Christmas Day, or Good Friday, but should not sit more than eight hours in a day. In the United Kingdom trials usually commence at ten or eleven o'clock and terminate at four or five o'clock. In cases of emergency a court can sit at any hour on any day. R. 64 K. 579

84. LEGAL INQUIRIES BY COURT.—On the court assembling, the order convening the court shall be read, and also the names, rank, and corps of the officers appointed to serve on the court. (The order or a copy thereof is marked, signed by the president, and attached to the proceedings.) R. 22

The charge-sheet and summary of evidence are laid before the court.

It shall be the first duty of the court to satisfy themselves that the court is legally constituted, *i.e.*—

1. That it is properly convened.

2. That the officers are sufficient in number and are not less than the number detailed.

3. That the regulations as to the rank and corps of officers have been observed, and that each of the officers assembled (including officers in waiting) is eligible, and not *disqualified* for serving on that court-martial. R. 20 R. 21 M. v 3

4. That the president is of the required rank and duly appointed. (Where there has been a previous court of inquiry on the case he must certify that no officer on that court has been appointed to serve on the court-martial.) 65

5. That the judge-advocate (if any) is duly appointed, and not disqualified. R. 101

The court should next satisfy themselves— R. 23

1. That the accused is amenable to military law and to the jurisdiction of the court. 58 60

2. That the charge discloses an offence under the Army Act, is properly framed, and is sufficiently explicit.

(The above inquiry by the court is not required to be, but may be, in closed court.)

The court, if not satisfied on any of the above matters, should report their opinion to the convening authority, and may adjourn for that purpose.

If before the accused is arraigned the full number R. 18 of officers detailed are, from any reason, not available to serve, the court should ordinarily adjourn for the purpose of fresh members being appointed; but if the court are of opinion that in the interests of justice it is inexpedient to adjourn, they may, if not reduced in number below the legal minimum, proceed, recording their reasons for so doing.

85. THE ACCUSED.—When the court have satisfied R. 24 themselves in the authorised manner, the prosecutor takes his place, and the accused, if not previously present, is brought before the court, attended by the officer or non-commissioned officer who has him in custody, or by an escort. (Both the prosecutor and the accused are usually present during the preliminary proceedings.)

Soldiers ordered for trial are to be examined by a K. 580 medical officer on the morning of each day that the court is ordered to sit, and commanding officers will be held responsible that no soldier is brought before a court-martial if in the opinion of the medical officer he is unfit to undergo his trial.

Soldiers should not be handcuffed or fettered unless absolutely necessary.

If an officer is being tried he is usually allowed a M. v 43 seat, and the court can grant the same privilege to any accused if they think it necessary either from the length of the trial or other circumstances.

The names of the president and members are read over in the hearing of the accused, and they severally answer to their names.

CHAPTER X

CHALLENGES—ARRAIGNMENT OF ACCUSED

86. THE CHALLENGE—Trial of Several Persons. 87. VOTING ON OBJECTION. 88. OBJECTION TO MEMBER. 89. OBJECTION TO PRESIDENT. 90. LIMITS TO OBJECTIONS. 91. GROUNDS FOR CHALLENGE. 92. SWEARING OF COURT—Trial of Several Persons. 93. ARRAIGNMENT OF ACCUSED—Joint Arraignment—Claim for Separate Trial. 94. PLEA TO JURISDICTION OF COURT. 95. PLEA IN BAR OF TRIAL. 96. PLEADING TO CHARGE.

86. THE CHALLENGE.—After the accused has heard R. 25 the names of the officers composing the court read S. 51 over he is asked if he objects to any of them. If he 90 does object he is asked to name *all* the officers against whom he desires to raise a protest.

The case of each officer objected to is decided on separately, the junior being taken first. If, however, the president is objected to, the objection to him will be disposed of before the objection to any other officer.

The accused may give evidence himself, and may R. 83 call witnesses to support his objection, and they can R. 84 be examined and cross-examined in the usual way, but as the court is not yet sworn it cannot administer an oath to the witnesses.

Trial of several persons.—When a number of ac- R. 71 cused persons have to be tried by one court, they may be all brought up together, and the question of objections be disposed of and the court sworn. Care

must be taken that each accused person is given an opportunity to object to the members of the court which will try his offence.

In the case of several accused persons to be tried separately, the court may proceed to determine any objection raised or may postpone the case, and swear the members of the court for the trial of those who do not object. Where persons are to be tried separately each case will be taken in succession.

- 87. VOTING ON OBJECTION.**—The court, after hearing and recording the statements made may be closed to consider the objection. R. 25
M. v 44

All the officers present (except the one the objection to whom is being considered) then vote as to whether the objection shall be allowed or not.

(The officer objected to would usually withdraw, but need not necessarily do so.)

An objection to a member is allowed if one-half of the votes of the other officers present are in favour of it. (The president has not a casting vote, as the trial has not commenced.) S. 51
S. 53

An objection to the president is allowed if supported by one-third of the other officers appointed to form the court.

An objection, if not unreasonable, should always be allowed, as a court should not only be impartial, but should be thought to be so by the accused and his comrades.

- 88. OBJECTION TO MEMBER.**—If the objection to a member is allowed he must retire. The vacancy is filled by one of the officers in waiting, and the accused must be given an opportunity of challenging any such new member. R. 25

If there are no waiting members, the court would ordinarily adjourn and report to the convening officer, who would either appoint fresh members or convene another court. In case of emergency the court can, R. 18
M. v 45

however, go on if its numbers are not reduced below the legal minimum, but the reason for so acting must be recorded in the proceedings.

89. OBJECTION TO PRESIDENT.—If the objection to the president is allowed, the court must adjourn and the convening officer can either appoint another president or convene another court. The senior member of the court, if of sufficient rank, and the court is not reduced below the legal minimum, may be appointed president. The accused has, of course, the right of challenge in respect of the new appointment.

90. LIMITS TO OBJECTIONS.—Persons who are being tried cannot object to the prosecutor or judge-advocate, or to a properly qualified counsel, as they do not form a part of the court.

The accused at this stage cannot object to the court as a *whole*, although subsequently, before pleading to a charge, he may offer a special plea to the general jurisdiction of the court. If the accused persists in objecting to the court collectively, it must be taken to mean that he objects to each officer individually, and such objections must be dealt with in the usual way.

91. GROUNDS FOR CHALLENGE.—The court has to decide on the reasonableness of the challenge from the *assertions* of the accused, the witnesses examined, and the officer objected to, though the latter, as a rule, is not called on to make a statement.

The ordinary grounds of challenge which an accused may fairly raise are, that a member—

(1) Has a personal interest in the case.

(2) Is prejudiced against the accused.

(3) Has formed and expressed an opinion on the case.

R. 25

An objection may also be raised to a member which is equivalent to a plea to the jurisdiction of the court (*e.g.* to his rank). In such a case the objection,

if valid, should be allowed, though it might be raised subsequently on arraignment.

The slightest personal interest in the case would R. 19 constitute a disqualification; for example, an officer cannot sit on the court for the trial of a man who has stolen property from the mess of his regiment.

When an officer is objected to on the ground of R. 25 personal enmity, prejudice or malice, or for having formed and expressed an opinion on the case, he should, under ordinary circumstances, request permission to withdraw. It is always desirable to allow objections unless they are obviously groundless.

92. SWEARING IN OF COURT.—When the challenges S. 52 have been disposed of the court is sworn in due form. R. 30

The oath is administered by the judge-advocate, R. 26 or, if a judge-advocate is not present, the president swears in the members, and afterwards one of the members swears in the president. The judge-advocate, if present, is sworn by the president or a member of the court. R. 27

An impartial person (not objected to by the accused) R. 72 can be sworn as interpreter or shorthand writer either M. v 69 now or at any convenient time during the trial.

An interpreter or shorthand writer can be sworn either now or at any convenient time during the trial.

A member of the court is not disqualified from acting as interpreter, but the accused might fairly object to the prosecutor taking up such a duty.

When any person has a sincere objection to take S. 52 the oath, a solemn declaration to the same effect as R. 28 the oath can be made.

Trial of several persons.—A court may be sworn to R. 71 try any number of accused persons then present before it. After the members are sworn each case is disposed of separately, and the accused persons not on their trial are removed from the court. The swearing of the court is to be recorded in the proceedings of each separate trial.

93. ARRAIGNMENT.—The witnesses, if in court, other R. 81

than the prosecutor and the accused, are ordered out of court, and if the accused has elected to be tried instead of being dealt with summarily by his commanding officer, the prosecutor informs the court of the fact. The charges in the charge-sheet are then read out to the accused one by one, and he is asked to plead to them separately. When there is more than one charge-sheet, the arraignment and subsequent proceedings up till after the finding should be taken on *each charge-sheet separately*. R. 31 M. v 49 R. 62

Where there is more than one charge on a charge-sheet the accused may claim to be tried separately in respect of any charge or charges on the ground that he will otherwise be embarrassed in his defence, and, if the claim is not thought unreasonable, the court deals with the charges as if they were on separate sheets.

Joint arraignment.—Any number of accused persons may be arraigned at the same time for an offence which they have committed collectively. Each accused person will be called on separately to challenge, to plead, and to make his defence, and a finding must be arrived at separately for each person accused, and each person accused found guilty must be separately sentenced, and a separate record accordingly will be made in the proceedings. The evidence on the part of all the accused persons will be taken before the prosecutor replies, and the prosecutor will make one address only in reply as regards all the persons being tried. R. 15 R. 71 R. 61

Claim for separate trial.—When arraigned before the court, an accused person who is being tried jointly with others can claim a separate trial on the ground that the evidence of one or more of the other accused persons is material to his defence. The court should allow the claim if it is reasonable and the charge admits of it. For instance, a separate trial could not be claimed by an accused who is charged with combining with others to excite a mutiny or form a conspiracy. R. 15 220 81

94. PLEA TO JURISDICTION OF COURT.—The accused before pleading to a charge may offer a special plea to the jurisdiction of the court, which would ordinarily refer to the fact— R. 34

(a) That the court is improperly constituted R. 22

(b) That he is not subject to military law.

(c) That he is not amenable to that description of court. For instance, a warrant officer or camp follower could not be tried by regimental court-martial, or a field officer could not be tried by a court upon which a subaltern sat as a member. S. 182 S. 184 S. 48

Evidence may be received for and against the plea, and the court decide in the usual manner by a majority of votes whether it shall be allowed or not. R. 34

If the court overrule the plea, the trial proceeds. If the plea be allowed, the court record their reasons for their decision, adjourn, and report to the convening officer, who either convenes another court or orders the release of the accused.

If the court are in doubt as to the validity of the plea, they can either (1) adjourn and refer to the convening officer, or (2) record a special decision with respect to the plea and proceed with the trial, leaving the dubious point to the confirming officer to decide. In the last case the confirming officer, if of opinion that the plea was valid, should not confirm the finding, and the trial would therefore be void.

95. PLEA IN BAR OF TRIAL.—The accused at the time of his general plea of 'guilty' or 'not guilty' may in addition offer a plea in bar of trial on the ground that the offence has been previously dealt with by a civil court, court-martial, or his commanding officer, that it has been pardoned or condoned, or that more than three years (or such shorter period as may be fixed for a civil offence) have elapsed since it has been committed. R. 36 S. 161

The court shall record the plea in bar as well as the general plea, and if in the opinion of the court the

facts stated are sufficient to support the plea, they shall receive any evidence offered and hear any address in reference to it.

If the court find the plea in bar is *proved*, they shall record their finding and notify it to the confirming officer, and shall either adjourn or proceed to the trial of the accused on any other charge that may be unaffected by the plea.

If the finding that the plea in bar is proved is confirmed, the accused will not be tried; if the finding is not confirmed, the court may be reassembled and proceed as if the plea had been found not proved.

If the court find that a plea in bar is *not proved*, they shall proceed with the trial, and the said finding shall be subject to confirmation like any other finding of the court.

Pleas in bar of trial if not now raised may be subsequently brought forward by the accused in his defence. 112

Evidence in support of pleas to jurisdiction and in bar of trial may be given by the accused himself, and he may, notwithstanding he has given evidence, address the court in support of his views. R. 34

96. PLEADING TO CHARGE.—Instead of pleading directly to the charge the accused may raise an objection to the charge on the ground that it does not disclose an offence under the Army Act, and is not in accordance with the rules of procedure. R. 32 M. v 51

The court either disallows the objection and proceeds to the trial, or allows the objection and adjourns and reports to the convening officer.

If no objection to the charge or special plea to the jurisdiction of the court to the charge is offered, or if such objection or plea has been over-ruled, the accused must either plead 'guilty' or 'not guilty' and his plea shall be recorded on each charge. If he refuses to plead, or does not do so intelligibly, a plea of 'not guilty' is entered for him. R. 35

CHAPTER XI

PROCEDURE AT TRIAL

97. PROCEEDINGS ON PLEA OF NOT GUILTY. 98. ADDRESSES—First—Second. 99. PROSECUTOR'S ADDRESS. 100. ADDRESS OF ACCUSED. 101. ORDER OF ADDRESSES—The Accused calls Witnesses—Does not call them—Joint Trials. 102. RECORDING ADDRESSES. 103. EMPLOYMENT OF COUNSEL—Statement by the Accused. 104. PROCEDURE IN SIMPLE CASES. 104A. INCIDENTS DURING TRIAL—Adjournments—Absence of President, Member, Accused, Prosecutor, and Judge-Advocate.

97. PROCEEDINGS ON PLEA OF NOT GUILTY.—When the accused pleads 'not guilty,' it is necessary for the prosecutor to prove, by the evidence of sworn witnesses, the substance of the charge which is made. It will not be sufficient for the prosecutor to allege certain facts and then to say, 'Let the accused be sworn and disprove my case if he can.' 69

The accused, on the other hand, has to explain away or refute the charges which are supported by the witnesses of the prosecution by giving evidence himself, or by calling witnesses to give evidence. R. 39 R. 41

98. ADDRESSES.—In complicated cases the prosecutor and the accused may desire to make an opening address before the examination of their witnesses, and a second address after their witnesses are examined.

Addresses are usually in writing, and after they' Ap. II.

have been read and handed to the president, are signed by him, and attached to the proceedings.

When a verbal address is made, the portions that the court think material should be taken down as far as possible in the words of the person delivering them, and any request of his as to the recording of a particular statement should be attended to.

It must be remembered that the value of an address depends wholly on the statements made in it being borne out by the evidence on oath of witnesses.

First address.—An opening address should point out clearly the view of the case taken by the person who makes it, and state in sequence the several facts, with their bearing on the case, which it is proposed to prove.

Second address.—A second address should sum up the evidence hitherto given, show how far it supports the statements made in the first address, and explain away the hostile evidence made in reply.

99. PROSECUTOR'S ADDRESS.—The opening address of the prosecutor should be confined to an intelligible explanation of the facts which he is about to prove. He must not enter into any irrelevant matter, or make any statement he is not prepared to prove, or use any violent language or strong expressions with a view of prejudicing the accused in the eyes of the court.

The second address of the prosecutor must be strictly confined to summing up the evidence actually given. He may comment on the evidence given by the accused, but must not comment on the fact that the accused has not given evidence. He would be justified in pointing out that the accused did not give his evidence until after he had heard the evidence of his own witnesses.

The prosecutor is in an official position, and is bound to act with scrupulous fairness towards the

R. 39

R. 60

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M. v 57

R. 40

R. 41

accused. He should not keep back or gloss over the weak points of the prosecution, or take any unfair advantage of the accused or suppress any evidence in his favour.

It is the duty of the court to check the prosecutor if he shows any want of moderation or fairness to the person who is being tried.

100. ADDRESS OF ACCUSED.—The utmost liberty M. v 61
should be allowed to the accused in making his ad-
dresses. He can question the motives of the prose- R. 41
cutor and his witnesses, lay blame on other persons, R. 60
and make statements not relevant to the charge or
supported by evidence. When statements are made R. 40
by the accused as to matters within his own know-
ledge they must be dealt with as evidence, though
not on oath. But if the accused has given evidence
himself, any statement which could have been made
on oath can hardly have much weight with the court
if not so made.

The court may caution the accused that in bring- R. 60
ing charges wholly irrelevant to his defence he may
render himself liable to be proceeded against under
S. 27, or may point out that the line of defence he is
taking is not likely to be of service to him. The R. 80
court should also caution him that if he conducts
his case so as to throw discredit on the witnesses for
the prosecution he will, if he gives evidence himself,
render himself liable to cross-examination as to char-
acter. Provided, however, he is not disrespectful to
the court, and does not use insulting language to other
persons, his defence should not be checked.

101. ORDER OF ADDRESSES.—The procedure as to ad-
dresses after the plea of 'not guilty' is recorded
varies as follows :—

(1) *When the accused calls witnesses to the facts of the R. 39
case, other than himself—*

- (a) The prosecutor may, if he desires, make an opening address.
- (b) The evidence for the prosecution is taken, the witnesses being liable to cross-examination by the accused and re-examination by the prosecutor. R. 84
- (c) The accused may, if he desires, make an opening address. R. 41
- (d) The accused may himself give evidence as a witness and may call his other witnesses, including witnesses as to character.

In special cases witnesses in reply may be called by the prosecution at this stage to rebut statements on new matter introduced by the witnesses of the defence, or to prove previous convictions or entries in the conduct book in the event of the accused calling witnesses as to character. R. 86

- (e) The accused may make a second address. R. 41
- (f) The prosecutor is entitled to an address in reply.
- (g) The judge-advocate, if present and it is deemed necessary, will sum up. R. 42
- (2) *When the accused does not call witnesses to the facts of the case, other than himself—* R. 39
 - (a) The prosecutor may, if he desires, make an opening address.
 - (b) The evidence for the prosecution is taken as before.
 - (b*) The accused, if he wishes to do so, will give evidence as a witness.
 - (c) The prosecutor may make a second address for the purpose of summing up his evidence, and commenting on the evidence of the accused (if any). R. 40
 - (d) The accused may make an address in his defence.

(e) Evidence for the defence as to character may be produced. M. vi 19

(f) The prosecutor may, as a reply, produce proofs of former convictions and entries in the conduct book, but cannot again address the court.

(g) The judge-advocate can sum up, if necessary. R. 42

Joint trials.—When two or more accused persons are being tried together, the addresses and evidence of all the accused persons should be taken before the prosecutor replies, and the prosecutor will make one address only in reply as regards all the accused persons. 81 131 220

102. RECORDING ADDRESSES.—When an address of the prosecutor or the accused is not in writing it need not be recorded to a greater extent than the court think necessary; but the court must in every case make a sufficient record of the defence of an accused person to enable the confirming officer to understand the reply he makes to the charges, and any particular matter in the addresses must be taken down at the request either of the prosecutor or of the accused. R. 95

103. EMPLOYMENT OF COUNSEL.—A counsel, to be properly qualified, must be a barrister or solicitor in England or Ireland or an advocate or law agent in Scotland, or elsewhere any person in a corresponding position. R. 93

A properly qualified counsel cannot be objected to.

Counsel is allowed to appear on behalf of the prosecutor or the accused, and can be appointed to act as judge-advocate, at all general and district courts-martial. The employment of counsel for the prosecution should rarely be necessary when the offences are of a purely military character. R. 88 70 72 K. 574

When counsel is engaged by one side, sufficient notice must be given to the other to enable it also to R. 89

retain counsel, but such notice is not essential in the case of an officer acting as counsel for the accused.

Their duties.—A counsel has all the rights belonging to the person he represents, and can orally examine and cross-examine witnesses, make addresses, &c.; but the person he appears for cannot then do any of the above things. A counsel for the accused will not be allowed to call him as a witness except on the application of the accused himself.

A counsel for the prosecution should always make an opening address, and should state therein the substance of the charge and the general nature of the evidence he proposes to adduce. R. 90

Counsel, whether for the prosecution or the defence, should adhere strictly to the rules which govern the procedure of military and civil courts. They must not state as a fact any matter which is not proved or intended to be proved, nor give opinions as to facts before the court, nor make assumptions as to matters not proven. R. 92

If a counsel puts to a witness a question which is not *relevant*, except so far as it affects the credit of a witness by injuring his character, and the witness objects to answer, the court will decide whether the imputation intended to be conveyed by the question, would, if true, seriously affect their opinion as to the credibility of the witness or not. If they think it would, they should insist on an answer being given; if they are of opinion it would not, they should disallow the question. If the question is put to the accused the court will have to consider whether, having regard to R. 80, he should be compelled to answer it. 241

Officer as counsel.—An officer subject to military law who assists the accused during his trial before a general or district court-martial has all the rights and duties of counsel, and may, at the request of the accused, assume such rights and duties. R. 87 109

Statement by the accused.—An accused person who is defended by counsel or by an officer subject to mili- R. 94

tary law and who does not wish to give evidence on his own behalf, may, if he thinks fit, at the close of the case for the prosecution, make a statement either in writing or orally in explanation of the subject of the charges against him; but such statement cannot be made on oath, nor is he liable to be examined thereon. The accused has the option of either giving evidence himself or making a statement. He need not do either, but cannot do both.

At the commencement of the defence the accused is asked if he wishes to make a statement in addition to the address of his counsel, and if he declares his intention of *not* making a statement the procedure depends, as before, as to whether witnesses to the facts of the case, other than himself, are called for the defence or not.

When an accused person decides that he will make a statement, the procedure will, as far as possible, be the same as if he had called witnesses to the facts of the case other than himself. The prosecutor will therefore be entitled to reply to the address of the counsel for the defence, and to call witnesses in reply to rebut any new matter introduced either in the statement of the accused or by the witnesses for the defence. The statement will be made at the close of the case for the prosecution and before the address of the counsel for the defence.

101

104. PROCEDURE IN SIMPLE CASES.—In cases where the evidence is simple and the witnesses are few, addresses are not generally used, but the evidence of the witnesses of the prosecution and the defence is taken in the same order as if there were addresses. An accused person is entitled to give his evidence at any time whilst the evidence for the defence is being heard, but he should usually give his evidence before any other witnesses for the defence, as otherwise the value of his evidence may be considerably discounted.

In ordinary cases the *evidence* produced by the prosecution must be finished before the accused is called upon for his defence.

When, however, any new matter which the prosecutor could not reasonably have foreseen has been introduced by the accused in his defence, or where the accused has called witnesses as to character, and it is necessary to prove previous convictions or entries in the conduct book, the prosecutor may call witnesses to give rebutting evidence. 238
R. 86

As a rule, if the accused does not call witnesses to the facts of the case, other than himself, he has the *last word*; if he does call witnesses to the facts of the case, other than himself, the prosecutor has the last word.

After the summing up of the judge-advocate, or, if there is no summing up, when the prosecution and defence have completed their case, the court is cleared for the purpose of considering its finding.

104A. INCIDENTS DURING TRIAL.—On any question in dispute that arises during a trial the opinions of the members of the court are taken in succession, beginning with the junior in rank. R. 69
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Subject to the provisions of the Army Act as to (1) the challenge, (2) the finding, and (3) the sentence of death, every question shall be determined by an absolute majority of the opinions of the members of the court.

In the case of an equality of votes on any sentence other than death or on any question, other than the finding, arising after the commencement of the trial (*i.e.*, the arraignment), the president shall have a second or casting vote.

Adjournments.—A trial should, as a rule, be continued from day to day, but a court may adjourn, if necessary, both from time to time as well as from place to place. If the date or place to which the adjournment is made is not fixed by the court, the S. 53
R. 63
R. 65

matter must be reported to the convening authority, who will arrange that an order is given for the subsequent assembly. When a court adjourns to another place the whole court must go, and not merely send a deputation, and the prosecutor and the accused must accompany them. Adjournments should not be made in order to afford the prosecutor or the accused time to procure evidence, unless it is clear that they had insufficient opportunity to do so. In cases of emergency which might arise on active service, the senior officer on the spot can adjourn or prolong the adjournment of a court.

The usual causes of adjournment are—that a court is not satisfied as to its legal constitution, or as to the qualification of the judge-advocate; that it has doubts as to its jurisdiction, the amenability of the accused to military law, or the explicitness or accuracy of the charge; that the accused has not been properly warned; that witnesses have been called without due notice to the defence; that the president, judge-advocate, or the accused, or material witnesses are not present.

Adjournment may be requested by the accused to prepare his defence, by the prosecutor to study his reply, and by the judge-advocate to compile his summing-up.

Adjournment to a different place may sometimes be necessary when troops are on the move, or to view a place, or to take the evidence of a sick witness.

The court should also adjourn to obtain a decision or opinion on special pleas, charges, etc., from the convening or confirming officer, and generally when necessary for the ends of justice.

Absence of president.—If from death, illness, disqualification, challenge, or other causes the president is absent, the court cannot proceed, and the senior member must at once report the fact to the convening officer, and adjourn the court. If such absence occurs before the trial has commenced, the

convening officer shall appoint another president, or convene another court. After the commencement of the trial no officer can be added to the court, but the convening officer may appoint the senior member of the court, if of sufficient rank, to be president, provided that the court is not thereby reduced below the legal minimum. Otherwise the court shall be dissolved and a new court convened. R. 18 89

Absence of member.—If before the commencement of the trial (*i.e.*, arraignment of the accused) the full number of officers detailed are from any cause not available to serve, the court should ordinarily adjourn for the purpose of fresh members being appointed. No officer can be added to a court-martial after the accused has been arraigned, but in all cases (whether before or after the arraignment of the accused) the court may, if necessary, proceed without the absentee, provided that the numbers of the court are not reduced below the legal minimum. If a court-martial *after the commencement of the trial* be from any cause reduced below the legal minimum, it shall be dissolved. A member of a court who is absent while any part of the evidence is taken can take no further part in the trial. Where the inability of an officer (president or member) to attend is merely temporary, the court will adjourn until he returns. R. 18 S. 53 R. 63 80

Absence of the accused.—A trial cannot proceed in the absence of the accused, and the court must adjourn until he is present. In case of the death of the accused, or of such illness as renders it impossible to continue the trial within a reasonable time, the court will take evidence on oath as to such death or illness, and report to the convening authority, who will dissolve the court. Where a court is dissolved before the finding under the foregoing provision of illness, the accused on recovery may be tried again. S. 53 R. 67

Absence of prosecutor.—The temporary absence of the prosecutor at any stage in the proceedings does

not affect their legality. But, when a prosecutor is absent, the court should adjourn until he returns or a new prosecutor is appointed by the convening authority.

Absence of judge-advocate.—A court-martial cannot R. 65 proceed in the absence of the judge-advocate, and R. 102 must adjourn until he returns or a new judge-advocate is appointed by the proper authority.

CHAPTER XII

PLEA OF GUILTY AND PARTLY GUILTY

105. PROCEEDINGS ON PLEA OF GUILTY—Exceptional Case—Warning to the Accused—Finding of Guilty. 106. STATEMENT BY THE ACCUSED. 107. TAKING EVIDENCE—As to Character—In mitigation. 108. PLEAS OF GUILTY AND NOT GUILTY—Procedure.

105. PROCEEDINGS ON PLEA OF GUILTY.—A plea of *M. v 54* 'guilty' is a conclusive admission by the accused of his guilt, and further evidence is not required for the purpose of proving the charge.

When an accused person pleads 'guilty,' care must be taken to explain the charge to him and prevent him pleading in error. For instance, a man might be charged with 'wilfully injuring the property of a comrade,' and plead guilty to so doing, but state at the same time that he did not inflict the injury intentionally. As he did not act 'wilfully,' a plea of 'not guilty' should be entered. *R. 35 R. 37*

Again, a man might plead guilty to desertion, but render the plea obviously an improper one by stating that he always intended to return.

When an accused person pleads guilty to two or more alternative charges, it must be pointed out to him that such a plea can only be recorded in respect of *one* of the charges. In the case of alternative charges the court may proceed with respect to all the charges as if the accused had not pleaded 'guilty' to any charge, or may accept his plea, and instead of trying him record a finding of 'not guilty' on each

alternative charge to which the accused has not pleaded 'guilty.'

Exceptional case.—Where alternative charges are preferred, one of which charges a less grave offence than the other, and the accused pleads guilty to the less grave offence, it is the duty of the court not to accept the plea of 'guilty,' but to try the whole case and proceed as though the accused had not pleaded guilty to any charge.

Warning to the accused.—The court, after satisfying R. 35 themselves that the accused fully understands the charge, should inform him of the general effect of the plea and of the difference in procedure which will be made by the plea of 'guilty,' and shall advise him to withdraw that plea if it appears from the summary of evidence that he ought to plead 'not guilty.' If the accused, though admitting the offence, wishes to show extenuating circumstances, he should plead 'not guilty,' in order to be able to produce evidence on his own behalf. A plea of 'not guilty' merely amounts to an expression of desire to have a formal trial.

It is advisable to point out to the accused that if he pleads 'guilty' the court will at once record a finding of guilty, and that they will only take evidence in order to enable them to fix the amount of punishment.

When great provocation for an offence is alleged, a court would be justified in going so far as to record a plea of 'not guilty,' even although the accused had pleaded guilty, in order to allow the existence of such provocation to be proved in the ordinary way.

Finding of guilty.—If the accused determines on R. 35 pleading 'guilty,' that plea shall be recorded as the finding of the court, and he is formally asked whether he has any statement to make in reference to the charge to which he has pleaded guilty.

106. STATEMENT BY THE ACCUSED.—If the accused R. 37 states any extenuating circumstances which should

in the opinion of the court be proved, or if it appears from the summary or abstract of evidence or otherwise that he does not clearly understand the effect of his plea, the court shall alter the record and enter a plea of 'not guilty.'

If at any time subsequently during the trial the court are of opinion that the accused has not admitted all the facts that constitute the offence charged, they may cancel their finding and proceed as upon a plea of 'not guilty.'

The statement made by the accused after the finding is unsupported by witnesses, and he cannot be examined thereon.

- 107. TAKING EVIDENCE.**—Sufficient evidence is then taken to enable the court to determine the sentence and allow the confirming officer to know the circumstances of the case. If there is a summary or abstract of evidence it will usually be enough to read it out and attach it to the proceedings. If there is no summary or abstract of evidence the court should take and record sufficient evidence in the usual manner. The accused may cross-examine the witnesses, but cannot produce witnesses in his defence, as the justice of the finding has been by him already admitted. R. 37
M. v 50

In mitigation.—Any statement by the accused in mitigation of punishment can now be received, and the court can, if they think fit, allow him to give evidence himself or call witnesses to prove the statements he makes. R. 37

As to character.—The accused at this stage in the proceedings is allowed to give evidence himself or call witnesses as to character, who are examined in the ordinary way.

The court then take the usual sworn evidence of an officer of the corps to which the accused belongs as to his character and particulars of service. R. 46
121

The subsequent proceedings as to sentence, confirmation, etc., are the same as when a plea of 'not guilty' is being dealt with.

108. PLEA OF GUILTY AND NOT GUILTY.—When an R. 37

accused person pleads guilty to some and not guilty to other charges (not alternative), care must be taken that he thoroughly understands the effect of his plea of guilty, and if there is any doubt about it a plea of not guilty should be entered.

Procedure.—After all reasonable precautions have been taken that the accused understands the effect of entering a plea of 'guilty,' the court proceeds with the trial on the charges to which he has pleaded 'not guilty.' After a finding has been arrived at in respect of the latter charges the court is reopened, and the charge to which the accused has pleaded guilty is again read to him, and the plea is recorded as the finding of the court, and the court shall receive any statement which the accused desires to make in reference to the charge. The subsequent procedure as to annexing the summary of evidence to the proceedings, etc., is detailed in the preceding paragraph.

CHAPTER XIII

THE DEFENCE

109. THE DEFENCE—Friend of the Accused. 110. HELP FROM PRESIDENT. 111. DUTY OF COURT. 112. PLEAS AVAILABLE. 113. REMARKS ON PLEAS—Insanity—Compulsion—Condonation—Misfortune—Ignorance—Drunkenness.

109. THE DEFENCE.—An accused person for whose trial R. 13 a general or district court-martial has been ordered R. 87 to assemble is always entitled to make a defence, which he must either carry out himself or permit his counsel, or an officer subject to military law, who has the same privileges as counsel, to carry out for him. The accused cannot address the court or examine witnesses if his counsel does so. He has, however, the option of either **103** giving evidence himself, or making a written or oral R. 94 statement at the close of the prosecution as to the offence with which he is charged, but such statement is not made on oath, nor is the accused liable to be questioned in reference to it.

Friend of the accused.—An accused person who does R. 87 not employ counsel or an officer acting as such can always have a friend, who may be either a legal adviser or any other person, to assist him during the trial, and a person so assisting him may advise him on all points and suggest the questions to be put to the witnesses. If the accused wishes to put in a written statement or address in his defence, he may, if he thinks it expedient, ask to have it read for him by the president or a member of the court.

At a regimental court-martial a counsel or officer

subject to military law may be present in court and aid the accused as a friend, but may not examine witnesses or address the court.

110. **HELP FROM PRESIDENT.**—It is the duty of the president to see that the accused does not suffer any disadvantage in consequence of his inability to properly examine witnesses, or of his not fully understanding the nature of the proceedings. The president should therefore put any questions to witnesses (including the accused if he gives evidence) which may tend to elicit the truth, or may call witnesses whom he considers able to give material evidence to the court. Particular care should be taken to see that the evidence given by the witnesses for the prosecution is similar to that in the summary of evidence, and if there is a discrepancy the witnesses should be cross-examined by the president as to the difference. R. 59
66
73
111. **DUTY OF COURT.**—The court is bound to hear whatever defence the accused may think fit to adopt. 'The utmost liberty consistent with the interests of parties not before the court, and with the respect due to the court itself, should at all times be allowed to the accused. He has an undoubted right to impeach by evidence the character of the witnesses brought against him, and is justified in contrasting and remarking on their testimony and on the motives by which they or the prosecutor may appear to have been influenced.' A court-martial can hardly go wrong in allowing the greatest freedom of speech, but should caution the accused, if necessary, that intemperate speech and wild accusations do not further his cause, and may, if indulged in without excuse, lead to his trial on a charge of making false accusations. The court should also caution him if he so conducts his case as to throw discredit on the witnesses for the prosecution, he will, if he gives evidence himself, render himself liable to cross-examination as to character. 100
M. v 61
S. 27
R. 80

112. PLEAS AVAILABLE.—An accused person in his defence may plead that—

1. The charge is not proved.
2. The evidence of the prosecution is contradictory or unworthy of belief.
3. There was an absence of criminal intent.
4. He was insane when offence was committed.
5. He acted under compulsion.
6. He had been acquitted or convicted of the 52 offence, or summarily punished for it.
7. The offence had been condoned or pardoned. 95
8. The trial is barred by limitation of time. 58
9. The offence occurred through accident, ignorance of fact, physical incapacity, or necessity.

Pleas against the jurisdiction of the court, if not 94 before urged, may be brought forward, as well as any plea in mitigation of punishment, such as ignorance of the law or provocation.

A plea that the accused has had no previous intimation of the evidence produced against him by the prosecution has no value in point of law.

113. REMARKS ON PLEAS.—The value of the defence made by the accused depends mainly on the extent to which it is supported by the evidence of sworn witnesses. The accused is now entitled to give 115 evidence himself, and it will be hardly possible to attach much weight to statements made not on oath which he might have made on oath.

When an unlawful act is committed criminal in- 251 tent is presumed, and it is for the accused to prove the absence of such intent.

Insanity.—Insanity excuses from guilt. To make a R. 57 man responsible for crime there must be 'knowledge that M. vii 9 an act is wrong, with power to abstain from doing it.'

Compulsion.—Compulsion is held to be a good defence if it can be shown that the accused was M. vii compelled by actual force or acted under fear of death, 11 and that the part taken by him in the unlawful acts was a subordinate part.

Condonation.—When an offence is committed and not punished or forgiven, but advisedly overlooked, the person implicated being continued in his employment, it is held to be a good plea of condonation. If an offender while in arrest is ordered to do duty either through some misapprehension or on account of the exigencies of the service, or if he has been granted a conditional release and the conditions have not been complied with by him, the offence is not thereby condoned. A person cannot condone an offence unless he has the power to dispose of the case and the act of condonation will nearly always proceed from a commanding officer. K. 482

Accident.—When mischief arises through an accident, chance or mistake, the main point to consider is whether the original act was a lawful one or not. If the act be lawful the accused person has committed no crime; if the act be unlawful he is liable for the consequences of his act. For example, a soldier is at target practice under ordinary conditions, and a bullet ricochets off the range and kills a man. The soldier is not guilty of any crime. If, however, a man fires a rifle in the air in the middle of London he commits an unlawful act, and if the bullet killed anyone he would be guilty of manslaughter. M.vii 26

Ignorance.—Ignorance of the law, or mistaking the purport of a law or order is no defence. Ignorance of *fact* is generally (but not always) admitted as an excuse if the ignorance does not arise from wilfulness or negligence. M. vii 13 251

Drunkenness.—Drunkenness is no excuse for crime. At the same time there are cases in which the fact that a man was drunk may justify a court-martial in awarding a less punishment than it otherwise would. M. iii 31 184

Incapacity through physical illness might in some cases be pleaded as an excuse. If a soldier disobeyed a command with which he was physically unable to

comply he could not in justice be found guilty of disobedience.

Necessity may be admitted as an excuse for crime M. vii when the accused can prove that the act was done .12 solely to prevent some serious evil from falling on himself or others whom it was his duty to protect.

CHAPTER XIV

THE FINDING

114. CLOSING THE COURT. 115. DELIBERATION—Recalling Witnesses—Adjournment. 116. VOTING. 117. FINDING—Validity of Conviction—Military *versus* Civil Courts. 118. 'NOT GUILTY'—Honourable Acquittal. 119. SPECIAL FINDINGS—On Alternative Charges—Of Insanity—Of cognate Offences—Remarks.

114. CLOSING COURT.—After the whole of the evidence R. 43
for the prosecution and the defence has been heard
(and, if necessary, summed up by the judge-advocate
if there is one), the court is closed for the purpose of
deliberating on the finding.

The judge-advocate (if any) remains present in R. 63
order that he may advise the court on legal points.
When the evidence is voluminous he produces such
notes or index to the evidence as may help the court
in referring to the record ; but it is entirely beyond
his province to express any opinion as to the case
except on a point of legality.

115. DELIBERATION.—The court should endeavour to be M. v 62
absolutely impartial, and should not allow them-
selves to be influenced by the consideration of any
supposed intention of the convening officer in send-
ing the case for trial, or by the fact that the accused
has claimed to be tried by court-martial instead of
submitting to the summary award of his commanding
officer.

It must be remembered that according to one of R. 43

the fundamental maxims of English law, a man is presumed innocent till he is proved guilty, and that by the terms of the oath the members are bound to try the accused *according to the evidence* or testimony of sworn witnesses.

In complicated cases it will be advisable for the president to put clearly before the court a statement of the questions to be considered and the bearing of the evidence upon them. As each statement is put forward the members can discuss how far it has been supported by sworn evidence, and to this end must carefully separate mere statements made by the prosecutor or the accused from facts proved by their respective witnesses. Some weight may, however, be allowed to a statement of the accused even though not given on oath. For instance, if the statement would not have been admissible as evidence from the accused, or if it is corroborated incidentally or otherwise by evidence, or if the accused has been unable to procure a witness who might have given evidence on the point, considerable weight may be allowed to the statement. It will, however, be hardly possible to attach any weight to a statement not on oath which the accused might have made on oath and subjected to the test of cross-examination. The court must not find a man guilty unless they are satisfied that the prosecutor has *proved* his guilt. If the prosecutor neglects his duty, it is not for the court to make good his deficiencies. An accused person must not be found guilty of an offence other than that with which he is actually charged. For example : a soldier was tried under Sec. 40 for wilfully firing off his rifle in his barrack room. A finding of gross carelessness in firing off his rifle was held to be an acquittal. Again, in the case of embezzlement, a court found that the accused was deficient in his accounts, and it was held to be an acquittal.

Recalling witnesses.—The court can, if they wish, call R. 86
or recall any witness (including the accused if he 238

gives evidence) at any time before the finding, but it is undesirable that a witness should be called or recalled after the defence is closed. If a witness is recalled, the questions asked should be limited to one or two questions relating to the evidence previously given by that witness.

Adjournment.—If a court is in doubt as to whether the facts proved constitute an offence under the Army Act, or, in the case of alternative charges, doubts which of the offences charged the facts proved do in law constitute, they may adjourn and refer to the confirming officer in order to obtain from him a legal opinion. If a judge-advocate is present there will seldom be a necessity for taking such a course. R. 44

116. VOTING.—The opinion of each member of the court, commencing with the junior in rank, will be taken separately on each charge in succession. R. 43

The president has no casting vote, and the opinion of the court shall be determined by the absolute majority of the opinions of its members, all of whom are bound to vote. If the votes are equally divided the accused must be found 'not guilty.' S. 53 R. 69

117. FINDING.—The finding must be recorded as 'guilty,' 'not guilty,' 'not guilty, and honourably acquit him of the same,' or a special finding may be made in certain cases. R. 44 119

When alternative charges are used, an accused person can only be found guilty of one of them, and 'not guilty' must be recorded against the others.

Validity of conviction.—Whenever it appears that a court-martial (1) had jurisdiction to try a person, (2) that the person was charged with an offence under the Army Act, (3) that the person was found guilty on legal evidence, the finding, if confirmed, shall be valid, notwithstanding any deviation from the Rules of Procedure, or technical defect, unless it appears that any injustice has been done to the offender. R. 56

Military v. civil courts.—The procedure in a military court differs from that followed in a civil court in the following points :—The finding need not be passed by a unanimous vote ; an accused person can at the same time be found guilty of several distinct offences ; the court may have to pass a special finding ; the court may have to revise its finding ; a finding of guilty has to be confirmed ; a finding of guilty is not disclosed until promulgated after confirmation.

118. 'NOT GUILTY.'—If an accused person is found 'not guilty' of *all* the charges in the charge-sheet which is the subject of investigation, the president will date and sign the proceedings, the finding will be announced in open court, and the accused will be released in respect of those charges. S. 54 R. 45

The releasing of the accused in respect of the charges on one charge-sheet does not prevent his being kept in custody and arraigned on another charge-sheet for another offence.

If the accused is found not guilty of some charges, but guilty of others, whether they be in one or more charge-sheets, the finding of not guilty is not published until the proceedings are duly promulgated. R. 53

If the accused be acquitted on *any* charge, such acquittal shall not require confirmation, nor is it subject to alteration or revision. 136 S. 54

The particulars set forth in a charge may have been proved in evidence, but the court must find the accused 'not guilty' if they are of opinion that the facts proved do not disclose an offence under the Army Act. For example, the accused might be charged with conduct to the prejudice of good order and military discipline in doing certain acts. It may be clear the offence charged was committed, but if the court are of opinion that it was not one which is against 'good order and military discipline,' they should bring in a verdict of acquittal. R. 44

An officer, again, may be charged with behaving in a *scandalous* manner. If the court think that the offence proved is not *scandalous* in a military sense, they must acquit, as in this word lies the whole essence of the charge.

Honourable acquittal.—Honourable acquittal should only be used in cases in which the charge affects the honour of the accused person. If any part of the transaction which is tried is discreditable to the character of the accused the finding should not be used. The Duke of Wellington made some very strong remarks on the fact of an officer being ‘honourably acquitted’ of an affair which arose out of a quarrel at a brothel.

119. SPECIAL FINDINGS.—The most ordinary form of R. 44 special finding occurs when the substance of a charge is proved but there is some discrepancy as to the particulars. An offence might be charged as having been committed in Dublin, while the evidence showed that it took place at the Curragh, and the finding should correct the error of place. A man, again, might be found guilty of a charge with certain exceptions, or guilty only of a portion of a charge—*e.g.*, the accused might be charged with making away with two pairs of boots, while the evidence showed that one pair only is missing; or the accused might be charged with using insubordinate language, while the evidence showed that the words uttered, though insubordinate, do not correspond in every detail with those in the particulars of the charge.

On alternative charges.—If the accused is tried on R. 44 alternative charges, and it appears to the court that 219 the substance of the offence charged is proved, but that it is not clear on which charge the accused is legally guilty, it is advisable to refer to the confirming authority for an opinion. The court may, however, pass a special finding, stating the facts which they find to be proved, and leaving the matter open

to the confirming officer to decide under which charge the offence falls.

R. 55

Of insanity.—If an accused person was insane at the time he committed the offence, or is insane when arraigned, a special finding to that effect is made, and such finding must be transmitted for confirmation. If the finding is not confirmed the accused may be tried by the same or another court-martial for the offence with which he was originally charged.

S. 130

R. 57

Of cognate offences.—An accused charged with certain offences may be found guilty of other offences of a cognate character. An accused charged with stealing or embezzlement may be found guilty of either, or of fraudulently misapplying the property in question.

S. 56

An accused charged with desertion, or attempting to desert, may be found guilty of either, or of absence without leave.

An accused charged with an offence involving a certain punishment can be found guilty of the *same offence* when committed under circumstances *involving a less degree of punishment*. For instance, a man charged with committing an offence on active service can be found guilty of committing it not on active service. And a man charged with 'striking his superior officer in execution of his office' may be found guilty of 'striking his superior officer.'

Remarks.—An accused who is charged with a distinct offence under the Act cannot (with the above exceptions) be found guilty of any other offence. For instance, an officer charged with 'behaving in a scandalous manner' could not be found guilty of 'conduct to the prejudice of good order and military discipline,' nor could a soldier charged with 'striking his superior officer' be found guilty of an offer of violence.

Special findings refer as a rule to the *particulars* of a charge. The only description of special findings which affects the *statement of an offence* is (1) those

allowed by Section 56 of the Army Act, and (2) that alluded to in the latter part of Rule of Procedure 44 (F), with reference to alternative charges, in which the court is in doubt as to which offence the facts proved do in law constitute, and leave the legal point to be decided by the confirming officer. For example, a man is charged in the alternative with 'using in-subordinate language to his superior officer,' and with 'conduct to the prejudice of good order and military discipline.' The court may find that the accused 'did , but doubt whether such facts constitute in law the offence stated in the first charge or in the second charge, and therefore find him guilty of the offence in such one of those charges as the facts in law constitute.' Ap. II.

CHAPTER XV

PROCEEDINGS BEFORE SENTENCE

120. REOPENING COURT. 121. EVIDENCE TAKEN—
Previous Convictions—Right of Accused. 122.
CIVIL CONVICTIONS. 123. EVIDENCE TO CHAR-
ACTER. 124. TRIAL OF OFFICERS AND N.C.
OFFICERS. 125. CLOSING COURT.

120. REOPENING COURT.—If the finding on a charge is R. 46
guilty, the court reopens and proceeds to take evi-
dence on oath as to the character and service of the
accused for its guidance in determining the sentence.

(Before taking such evidence any other charge in the
charge sheet to which the accused has pleaded guilty
will be read again to the accused and the Proceedings
on plea of ' guilty ' will be followed.)

The person who gives the evidence should be usually
the captain or other officer of the company to which
the accused belongs; but it may be given by the
adjutant or the prosecutor or any other officer, but not
by a member of the court.

121. EVIDENCE TAKEN.—The evidence is produced in R. 46
the form of a written statement, which shows the
number of entries in the conduct sheets of the accused
(exclusive of convictions by a court-martial or
civil court), the number of instances of gallantry or
distinguished conduct, whether at the present time
under sentence, the length of time he has been in
confinement awaiting trial, his age, date of attestation,
and service towards discharge and pension, and whether
he is entitled to any gratuity or deferred pay, or

possesses any decoration or reward which can be forfeited by order of the court. 205

If the charge is for drunkenness, the entries for drunkenness must be stated separately.

Previous convictions.—A schedule of convictions by a civil court or court-martial is also produced (certified by the signature of an officer), and the witness is asked to identify the accused as the person referred to in the above statement and schedule, and to testify that the evidence given has been correctly taken from the regimental books. The summary reduction of a non-commissioned officer by order from army headquarters does not count as a previous conviction. Ap. II.

When the previous convictions against the accused are not recorded in the regimental books, a copy of a civil conviction certified by the clerk of the court, or a certified copy of the proceedings or part of the proceedings of a court-martial, is admissible as evidence. S. 164 S. 165

Right of accused.—The accused may request that any statement made is compared by the court with that in the regimental books or a certified copy therefrom, and may cross-examine the witness producing it, and may address the court thereon. R. 46

122. CIVIL CONVICTIONS.—A previous conviction by a civil court must of necessity be a conviction recorded against a man when serving *as a soldier*, whether the offence be committed in his present or in another corps, or while in a state of desertion or illegal absence. Any conviction against him as a civilian before his enlistment or any conviction after his enlistment for an offence committed prior to his attestation, is not admissible. K. 553 1919

A sentence of imprisonment for seven days or under is not produced in evidence as a former conviction, but treated as an ordinary entry in the regimental conduct sheet.

123. EVIDENCE TO CHARACTER.—It is not competent for the court to take verbal evidence of the accused R. 46

being a *bad* character. The opinion of a man's character must be formed by the court from the schedule of convictions and entries in the conduct sheets, and from the examination and cross-examination of any witnesses to character (including the accused) who may have given evidence for the defence.

The court may, however, obtain an opinion as to a man's good character if he does not produce such evidence on his own behalf.

- 124. OFFICERS AND N.C. OFFICERS.**—On the trial of an officer it would be necessary to take evidence as to the date of his army and regimental rank, so as to be able to sentence him to any loss of seniority of rank, and previous convictions, if any, should be produced. S. 44

Evidence should be taken as to any medal or decoration of which the court can order the forfeiture, but cannot be taken with respect to any decoration of which the court cannot order the forfeiture, as for example, the Victoria Cross, or an order which is the personal gift of his Majesty, such as the Companionship of the Bath, or a medal or order that has been conferred by a foreign power. The fact of an officer possessing distinctions of any kind would probably be brought forward in his defence. P.W. 637 R. 46 198

In the case of warrant officers (not holding honorary commissions) and N.C. officers, evidence should be taken as to their previous regimental rank, and any of the usual details in the statement as to character which are applicable to the particular case.

- 125. CLOSING COURT.**—After the above evidence is taken, the court is closed for the consideration of the sentence. Before this is done the prosecutor will call the attention of the Court to any exceptional punishment that may fall on the accused by reason of the finding of the court (such as forfeiture or reduction of corps pay). The accused is then given an opportunity of addressing the Court before it is finally closed. R. 46

CHAPTER XVI

THE SENTENCE

126. AMOUNT OF PUNISHMENT—Common Errors—Character of offence—Attendant Circumstances. 127. VOTING ON SENTENCE—Nature of Punishment—Amount of Punishment. 128. COMMENCEMENT OF SENTENCE—Combined Sentence. 129. WORDING. 130. ONE SENTENCE. 131. JOINT TRIALS. 132. RECOMMENDATION TO MERCY. 133. REMARKS BY COURT. 134. FORWARDING PROCEEDINGS—Original Proceedings. 135. CUSTODY OF PROCEEDINGS.

126. AMOUNT OF PUNISHMENT.—In passing sentence **193**
courts-martial should be careful not to err on the side of too much severity. The proper amount of punishment is the least amount which meets the justice of the case and is necessary for the maintenance of discipline. Except with hardened offenders, a short sentence is as likely to be effective as a long one. Purely military offences are now to be punished by *detention*, and imprisonment will only be awarded for crimes of a disgraceful or fraudulent nature, or in cases where it is desirable that a soldier should be sentenced to discharge with ignominy. For the first desertion within the first six months' **K. 583**
service, and for the lesser class of offences usually dealt with by courts-martial, including all offences liable to be treated summarily by a commanding officer, the punishment should not exceed twenty-eight days' detention. An addition of from seven to twenty-eight days may appropriately be made in the

case of each previous conviction or of any circumstances that aggravate the gravity of the offence.

A punishment not exceeding 112 days' detention may be awarded for striking a superior, grave disobedience, desertion, fraudulent enlistment, false evidence and accusations, and serious offences dealt with under Section 40. A sentence of detention of over 112 days is seldom given and should be reserved for the above offences when repeated or attended with circumstances which add to their gravity.

A sentence not exceeding 112 days' imprisonment should be awarded in cases of theft, fraud, and civil offences. From 113 days to six months' imprisonment would be given for repeated or grave cases of the above, or for an offence under S. 32. A sentence that amounts to or exceeds one year's imprisonment should be imposed only for a second offence under Section 32, and for gross violence to superiors and disgraceful conduct under Section 18 (5).

Discharge with ignominy should be awarded in the case of any persistent repetition of serious military offences, and for offences of a disgraceful or fraudulent nature, and for offences under Section 32.

Common errors.—The court must not fall into the common error of awarding a heavy sentence for the reason that the convening officer has sent the case for trial to a superior court. If a general court-martial considers that an offence may be properly punished by 28 days' detention, they should pass that sentence and no more. When the accused has elected to be tried in preference to submitting to the award of his commanding officer he should not be punished for exercising his legal rights, and when the claim has been made in apparent good faith the accused should not be awarded a punishment exceeding that which could be given by his commanding officer. M. v 80

Character of offence.—In the case of offences against superiors, an offence having relation to the office 51
K. 554

held by the superior is of greater gravity than an offence against the individual apart from the duties of his office, and (especially in minor cases of the above offences) the lower the rank of the superior, the less will usually be the gravity of the offence. 159

Attendant circumstances.—In addition to considering the nature and degree of the crime, the character of the accused, and the circumstances in extenuation or aggravation of the offence, the court will have to regard the consequences which by virtue of statute or regulation are involved by their finding or sentence, in addition to the punishment awarded. On account of the prevalence of a particular crime or a general lax state of discipline, it will in some cases be necessary to award a more severe punishment than would ordinarily be sufficient. Attention should be drawn periodically in local orders to any unusual prevalence of an offence, and not by special directions to a court-martial. K. 583

In awarding imprisonment or detention the court should also keep in view the locality and climate in which the soldier under sentence has to undergo the punishment.

127. VOTING ON SENTENCE.—Every member must vote on the sentence, even although he may have given a previous opinion in favour of acquittal. A court-martial acts in the two-fold capacity of judge and jury, and the court, having given their verdict as jurors, must act as judge in awarding a punishment adequate to the offence of which the accused has been declared guilty. Every question in connection with the sentence must be decided by an absolute majority, and in the case of equality of opinions, the president has a casting vote. R. 69 S. 53

Sentence of death cannot, however, be passed without the concurrence of two-thirds of the officers composing the court, nor can it be passed by a field-general court-martial unless all the members concur. S. 48 S. 49 R. 118

Nature of punishment.—When there is a difference of opinion as to the punishment to be inflicted, the court decides first as to its nature and secondly as to the amount. R. 69

The president puts before the court the most lenient species of punishment applicable to the case that has been suggested, and if that is not carried, one more severe, and so on.

Amount of punishment.—When the nature of punishment is decided on it is necessary to vote for the amount. The opinion of the members is taken seriatim, beginning with the junior member, and then the president puts forward each opinion separately to be voted on, beginning with the most lenient.

It is always desirable that there should be some free discussion as to the sentence before the votes are taken, as otherwise the junior officers, whose opinion is first asked, may, from lack of experience, give either a foolish or mischievous vote.

- 128. COMMENCEMENT OF SENTENCE.**—A sentence of penal servitude or imprisonment or detention, whether the sentence has been revised or not, and whether the person is undergoing sentence or not, shall be reckoned to commence from the date of the president's signature at the close of the proceedings. Care must be taken, therefore, that the proceedings are correctly dated and signed by the president, and also by the judge-advocate, if there is one. Any delay caused by revision or confirming the proceedings is all to the benefit of the prisoner, as his punishment is already fixed, and may be mitigated but cannot be increased. S. 68 R. 50

S. 54.

Where a soldier sentenced to be reduced to the ranks was found not to have legally the grade of a non-commissioned officer, and the court on revision passed a sentence of imprisonment; the imprisonment was held to commence on the date of the

original sentence of reduction. If a sentence of S. 57 penal servitude be commuted to imprisonment, or of imprisonment to detention, the commuted punishment is held to commence from the date of the original sentence.

Combined sentence.—When the accused who has been K. 584 awarded punishment by the court is a person under sentence who is undergoing punishment as the result of a previous award, the new sentence runs concurrently with the old one, and allowance must be S. 68 made for the portion of the old sentence which is unexpired.

For example, an accused person has twenty-eight days of unexpired sentence to undergo. The court wish to give for the offence charged an award of eighty-four days' imprisonment. They will then sentence the accused to 112 days' imprisonment, as 28 days of the second sentence will run concurrently with the old sentence.

A sentence of penal servitude, imprisonment, or detention to commence 'at the expiration of' or 'in addition to' another sentence would be illegal.

When the accused is undergoing imprisonment or S. 68 detention at the date the sentence is awarded, it must be remembered that the total amount of imprisonment or detention resulting from the combined 202 sentences must not exceed two years.

129. WORDING.—The sentence must be in accordance S. 44 with the provisions of the Army Act, and should be Ap. II. worded as shown in the Appendix of the Rules of Procedure.

The sentence must fully describe the prisoner by number, rank, name and regiment.

If a non-commissioned officer is being tried and 213 has acting rank, such rank should be noticed in the charge-sheet, but no reference should be made to it S. 183 in the sentence, and any sentence of reduction from or to an acting rank is void,

All dates and numbers that occur in a sentence are to be written out in full, and in every case the sentence is to be marginally noted.

Terms of imprisonment or detention not amounting to six calendar months will be awarded in days. K. 58
S. 44
Terms of imprisonment or detention of one year and two years will be awarded in years. S. 18
Other terms of imprisonment or detention will be awarded in months, or if required, in months and days. A sentence of penal servitude or imprisonment should in the case of an officer be preceded by a sentence of cashiering, and a non-commissioned officer who is sentenced to penal servitude, imprisonment, or detention should first be reduced to the ranks, although those sentences necessarily involve a reduction to the ranks.

- 130. ONE SENTENCE.**—Courts-martial award only one sentence in respect of all the offences of which an accused has been found guilty, and the sentence is deemed to be awarded in respect of any of the offences charged, and irrespective of whether the accused is tried on one or more charge-sheets. For instance, a man is charged with a second offence of fraudulent enlistment and also with drunkenness and theft. A sentence of penal servitude can be given, as it is justified by the first offence, although not applicable to the others if taken separately. R. 48
- 131. JOINT TRIALS.**—In the case of several accused persons being tried together, each of the accused will be called upon separately to challenge, plead, and make his defence, and a finding must be arrived at separately for each person accused, and each person accused found guilty must be separately sentenced, and a separate record accordingly will be made in the proceedings. 101
220
R. 71
- 132. RECOMMENDATION TO MERCY.**—When a court recommends a person under sentence to mercy, the S. 53
R. 49

reasons for taking such a course shall be given, and the recommendation is entered in the proceedings and promulgated with them. The number of opinions by which the recommendation was adopted or rejected may be mentioned. M. v 88

It is the duty of a court-martial to award a sentence which is just and suitable to the circumstances of the case, and a recommendation to mercy will therefore be rarely necessary. Occasions for its use may, however, arise in the case of a peremptory punishment, such as the cashiering of an officer for scandalous conduct, where the court has no option as to sentence.

Again, a court may, in the case of a very serious offence, feel bound to inflict a severe punishment, but at the same time may think that, owing to the character of the person under sentence, or other exceptional circumstances, some mercy may, without injuring military discipline, be shown by the confirming officer, although not by themselves as judges of the case.

A court may also recommend a restoration of forfeited service, giving its reasons for doing so. S. 79
R. 49

- 133. REMARKS BY COURT.**—If a court wishes to make any remark as to the conduct of the prosecutor, witnesses, or any incidents connected with the trial, it should be embodied in a separate letter. The law as to libel is somewhat obscure, and there seems some doubt as to the extent to which the opinions uttered by a court would be privileged from an action at law. It is advisable that any remarks made should deal only with questions of fact immediately connected with the procedure of the trial. M. viii
75

- 134 FORWARDING PROCEEDINGS.**—The proceedings are completed by the president signing and dating them. The judge-advocate, if present, also adds his signature, and they are forwarded without delay to R. 50

the proper authority. When an accused has pleaded R. 17
'not guilty,' the summary of evidence will be enclosed
with the proceedings when sent to the confirming
officer; it need not, however, be annexed to the
proceedings unless there is a material variance between
the statement of any witness in the summary and
his evidence at the trial.

Original proceedings.—If the proceedings are recorded R. 97
in duplicate, one of them is considered the original
and the other as a certified copy. The original pro-
ceedings, and not the copy, must be sent to the
confirming officer. A president who has written out
and signed proceedings on an obsolete form may be
required to re-write them on a proper form, and the
copy thus made may be confirmed as the original
proceedings.

As a rule, certified copies of original documents, K. 581
and not the originals themselves, are attached to the
proceedings, but the original documents should be
produced if possible to the court and afterwards
returned to their proper custodian. In forwarding
proceedings which contain statements made in
mitigation of punishment the covering letter should
state (where necessary) that such statements either K. 595
have been or are being investigated.

The proceedings of a general court-martial held at K. 592
home are transmitted to the judge-advocate general;
if held abroad, to an officer who has authority to
confirm general courts-martial, who, if unable from
any cause to confirm the proceedings of that par-
ticular court-martial, will forward the same to the
judge-advocate general.

The proceedings of district courts-martial are for- R. 97
warded to the officer specified in the order convening
the court, or, in default of such direction, to the con-
firming officer.

The proceedings of regimental courts-martial are
forwarded by the president to the confirming officer.

The fact that proceedings have resulted in acquittal

or that, for any reason, they have not been confirmed should not prevent their being forwarded to the proper authority.

135. CUSTODY OF PROCEEDINGS.—The proceedings shall be deemed to be in the custody of the judge-advocate (if any), or, if there is none, of the president, but may with proper precautions for their safety, be inspected by the members of the court, the prosecutor, and prisoner respectively at all reasonable times before the court is closed to consider the finding. R. 96

After the trial is completed, the proceedings of general and district courts-martial are kept in the judge-advocate general's office for seven and three years respectively, and those of the regimental courts-martial are kept with the regiment until the next general inspection, and then forwarded to the officer in charge of records and preserved for a total period of three years. Copies of the proceedings may be obtained on payment by the person tried, within the time limited for their preservation. R. 98 K. 595 1928 R. 99 S. 165

The regulations as to the custody of proceedings apply to all cases where an accused is brought before a court-martial, whether the finding be one of acquittal, or whether the finding and sentence be confirmed or not. R. 124

CHAPTER XVII

CONFIRMATION

136. CONFIRMATION. 137. CONFIRMING OFFICERS—Not a Member—On board ship—Trial of Marines. 138. POWER OF CONFIRMING OFFICER—Mitigation—Remission—Commutation—Restitution of Stolen Property. 139. REVISION—Only once—Absence of Members—Revising Finding—Revising Sentence. 140. IRREGULARITY IN PROCEEDINGS. 141. CONFIRMATION IN ERROR. 142. CONFIRMATION OF FINDING—Finding of Insanity. 143. NON-CONFIRMATION OF FINDING. 144. CONFIRMATION OF SENTENCE. 145. SPECIAL CONFIRMATIONS. 146. REMARKS OF CONFIRMING OFFICER. 147. REFUSAL OF CONFIRMATION. 148. OVERRULING OF CONFIRMING OFFICER. 149. PROMULGATION OF PROCEEDINGS—Forwarding of. 150. CORRECTION OF PROCEEDINGS. 151. LOSS OF PROCEEDINGS.

136. CONFIRMATION.—The procedure in military courts differs from that in civil in that the finding and sentence have to be confirmed by an authority independent of the court. The interposition of a confirming authority before a sentence can be executed enables a further review of the case to be made by an unprejudiced person, affords a check against any rash or illegal exercise of power by a court, and tends to cause a merciful application of justice.

The finding and sentence of a court-martial are S. 54 not valid unless they be duly confirmed.

The only exception to this rule is the finding of acquittal on a charge, which does not require confirmation. 118
S. 54

When there is no confirmation there is no conviction and the whole proceedings are null, and the prisoner can be tried again. 62
M. v 97

The proceedings of a court-martial are not out of the hands of the confirming officer until they are duly promulgated. Up to that time he may vary or amend in any way his minute of confirmation so long as in its final shape it is not inconsistent with law.

137. CONFIRMING OFFICER.—General courts-martial at home are confirmed by the King, those abroad by an officer deriving authority by a warrant either directly or indirectly from the King. He must not be below the rank of field officer, except in rare cases abroad, where a captain may be authorised by a special warrant. S. 54
79
S. 122

District courts-martial are confirmed by an officer holding a warrant to convene general courts-martial, or an officer (not below the rank of captain) to whom he has delegated power by warrant to convene and confirm district courts-martial. General officers commanding-in-chief at home may delegate the power of convening and confirming district courts-martial to such officers as they think advisable, not below the rank of lieutenant-colonel. S. 123
K. 54

Regimental courts-martial are confirmed by the convening officer, or by an officer who has authority to convene at the date of confirmation. S. 54

Not a Member.—A member of a court-martial not confirm its proceedings, and when a member from his position becomes confirming officer the matter must be referred to a competent superior authority. In the event of the case in question arising in a colony, and there being no military 271
S. 54

superior available, the Governor of the colony can himself confirm.

It is generally held that an officer acting as judge-advocate on a court-martial cannot confirm its proceedings.

On board ship.—When a court-martial is held on S. 188 board a ship not in commission, the proceedings can be confirmed provided there is a confirming 57 authority on board who had the power to confirm at the port of embarkation.

When there is no such authority, confirmation takes place on disembarkation, by the officer who would have had authority to confirm if the case had been tried at the place of landing. Troops en route for the S. 189 seat of war are considered to be on active service and can be treated accordingly.

When a regimental court-martial for the trial of M. 728 a non-commissioned officer is held on board one of H.M.'s ships, the commanding officer of the troops will confirm, but the sentence (of reduction, fines, and stoppages) cannot be carried out without the concurrence and order in writing of the captain of the ship.

Trial of marines.—In the case of the trial of a S. 179 marine, the Admiralty have power to confirm general courts-martial or authorise by warrant an officer to confirm either general or district courts-martial. If no warrant is issued by the Admiralty, the proceedings are confirmed by the usual authority who would deal with the case of a soldier of the regular forces.

- 138. POWER OF CONFIRMING OFFICER.**—It is the K. 588 province of a confirming officer to take care that the finding and sentence are legal, and to regulate the amount of punishment, and ensure that it is not greater than the interests of discipline and the merits of the particular case require. On receiving R. 51 the proceedings the confirming officer may confirm,

partially confirm, refuse to confirm, or send back either finding or sentence or both for revision.

When confirming the proceedings he may mitigate, S. 57 remit, commute, or suspend the execution of the sentence. A confirming authority cannot, however, S. 16 commute the sentence of cashiering passed on an officer for scandalous conduct.

He may also vary the form of sentence if it be R. 56 informally expressed, or the amount of it if it award a punishment in excess of the punishment authorised by law, and may in any case refer the finding and sentence either wholly or partially to a superior S. 54 authority. A wholly illegal sentence, such as penal servitude passed by a district court-martial, cannot be amended by a confirming officer. In any such case the confirming officer should treat the sentence as a nullity and direct the court to re-assemble and pass a valid sentence.

In some cases of special findings on alternative 119 charges he will have to decide upon which charge R. 55 the finding is to hold good.

Mitigation of a sentence means the awarding a less amount of the same species of punishment, and has the same effect as remitting a portion of the sentence. For instance, a sentence of forty-two days' detention may be mitigated to one of twenty-one days.

A confirming officer may mitigate the sentence of reduction to the ranks of a non-commissioned officer by placing him at a lower place in his rank, or reducing him to a lower grade.

Remission refers to the taking away of the whole or any portion of the punishment. Thus, of a sentence of eighty-four days' imprisonment with hard labour, the whole may be remitted, or twenty-one days of it, or the hard labour alone may be taken away.

Commutation is changing the description of punish- 212 ment by awarding a less punishment or punish- S. 44

ments. A punishment laid down by scale can always be commuted to one lower down in the scale to which the offender might have been sentenced. Thus death may be commuted to penal servitude, or penal servitude to imprisonment, or imprisonment to detention. But a confirming officer cannot commute a sentence to a punishment it would not have been within the power of the court to award; *e.g.* in the case of an officer cashiered for scandalous conduct the sentence cannot be commuted as no other sentence could have been awarded.

A confirming officer, as such, cannot commute a punishment into general service, as the power is restricted to the authorities named in S. 83 K. 597 S. 57 R.P. 128. Partial commutation of any one punishment by the substitution for a portion thereof of another punishment is illegal. Thus a sentence of eighty-four days' imprisonment could not be commuted to one of forty-two days' imprisonment and stoppages, nor could a sentence of one year's imprisonment be commuted to six months' imprisonment and discharge with ignominy.

Where a soldier employed on active service beyond the seas during the present war is sentenced to penal servitude or imprisonment, the confirming officer may direct that he be not committed to prison until the orders of a superior military authority be obtained as to whether the sentence shall be temporally suspended.

Restitution of stolen property.—The authority confirming the finding and sentence of a court-martial may order stolen property or the proceeds of stolen property found on the offender to be delivered up to the lawful owner of the property. Where property stolen has been sold or pawned to an innocent third party, the said authorities may, after the restitution of the property to the lawful owner, order that out of any money found in the possession of the offender a sum not exceeding the amount of the proceeds of

S. 75.

K. 586

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the sale or pawning shall be paid to the said person purchasing or taking in pawn. In order to recover his property from a pawnbroker an owner may have to take out a summons under the Pawnbrokers Act.

139. REVISION.—When a confirming officer does not ap- **R. 51**
prove of either the finding or sentence, he can
order the court to reassemble for the purpose of
revision.

The order directing the reassembly should contain the reasons why the confirming authority thinks a revision desirable, and should be embodied in a separate minute, which is read out to the court and attached to the proceedings.

When the finding or sentence is sent back for re- **R. 52**
vision the court re-assembles in *closed court*, and **S. 54**
considers the remarks of the confirming officer, but
no further evidence can be taken.

Only once.—Revision can only be ordered once, and **S. 54**
in no case must a confirming officer comment upon a **K. 589**
finding of 'not guilty' or upon the inadequacy of a
sentence.

Absence of members.—If any member of the original **R. 65**
court is unavoidably absent, the reason for his **S. 53**
absence is stated and attached to the proceedings, **67**
and if the legal minimum of members is present the
court can either proceed without him or adjourn till
his return as they think proper. If the president is
unable to attend, the court must adjourn and report
the fact, and the convening officer must, if the senior
member of the court is of sufficient rank, appoint him
to be president.

If the legal minimum of officers or the judge- **R. 65**
advocate (if there is one) is not present, or if the **R. 52**
president is absent, and it is impracticable to make
the senior member take his place, revision is im-
possible, and the proceedings are returned to the
confirming officer, who must then deal as he thinks
fit with the original finding and sentence.

Revising finding.—When the finding is sent back S. 54 for revision, and the court do not adhere to their R. 52 former finding, they shall revoke the finding and sentence and record a new finding, and, if such new finding involves a sentence, pass sentence afresh. A finding of acquittal on any charge cannot be revised. A finding of insanity, in which case there is no sentence, is subject to revision.

Where the finding is sent back for revision and S. 54 the court adhere to the finding, they can nevertheless revise the sentence, but they have no power to increase the sentence originally awarded.

A finding cannot be altered so as to entail a more severe sentence—*e.g.*, on a charge of desertion the court originally find the prisoner guilty of ‘absence without leave’; this cannot be revised into a finding of desertion.

Revising sentence.—When the sentence is sent back S. 54 for revision, the court cannot revise the finding, nor R. 52 *increase* the sentence originally awarded.

If a court passes a sentence which is partly legal R. 51 and partly illegal it cannot, on revision, alter the R. 56 illegal portion into any other punishment, as it would thereby be increasing the original sentence. It should simply pass again the legal portion of its former sentence and omit the illegal part.

Where a sentence in excess of that authorised by law has been passed, a court on revision can bring it into conformity with the law by reducing it, and where revision is impracticable, the confirming officers may remedy the defect.

If a court passes a *wholly illegal* sentence it is null and cannot be amended by the confirming officer, and the court on revision have the same power of sentence as if they had passed no sentence at all; *e.g.*, a court sentence a lance-corporal to be reduced to the ranks; the confirming officer re-assembles the court in order that they may pass a legal sentence.

The proceedings after revision are dated and signed in the same manner as the original proceedings, and sent back to the confirming officer. R. 52

140. IRREGULARITY IN PROCEEDINGS.—When it appears to a confirming officer that the proceedings of a court-martial are illegal, or involve substantial injustice to the accused, and he has not confirmed the finding and sentence, he will withhold his confirmation; if he has confirmed the finding and sentence he will direct the record of the conviction to be removed and the accused to be relieved from all consequences of his trial. If an irregularity has occurred which is simply of a technical character, and which does not affect the merits of the case, or lead to injustice being done to the accused, the proceedings may be confirmed, and the sentence should be mitigated if the confirming officer thinks that a reduction is necessary on account of the informality in question. K. 591

appears to a confirming officer that the proceedings of a court-martial are illegal, or involve substantial injustice to the accused, and he has not confirmed the finding and sentence, he will withhold his confirmation; if he has confirmed the finding and sentence he will direct the record of the conviction to be removed and the accused to be relieved from all consequences of his trial. If an irregularity has occurred which is simply of a technical character, and which does not affect the merits of the case, or lead to injustice being done to the accused, the proceedings may be confirmed, and the sentence should be mitigated if the confirming officer thinks that a reduction is necessary on account of the informality in question. 62 138

Informality in the finding and sentence will, as a rule, be amended by sending back the proceedings for revision. A confirming officer may, however, vary the wording of an informal sentence, and, if the sentence be in excess of that authorised by law, may reduce it to a legal amount and then confirm it. He cannot, however, amend a sentence that is wholly illegal, as, for instance, a sentence of discharge with ignominy given by a regimental court-martial, or a sentence of reduction of a lance-corporal to the ranks, but must direct the court to re-assemble and pass a valid sentence. R. 56

The proceedings of a court-martial are not out of the hands of the confirming officer until they are duly promulgated. Up to that time he may vary or amend in any way his minute of confirmation, so long as in its final shape it is not inconsistent with law.

Irregularities discovered after promulgation can 148

only be dealt with by the authorities specified in S. 57 the Army Act.

- 141. CONFIRMATION IN ERROR.**—When a person not S. 54
duly authorised confirms in error, his act, as well as
the promulgation thereof, is a nullity, and it is still
open to the proper authority to subsequently con-
firm.

When a punishment is inflicted on a person in
pursuance of the action of a confirming officer who is
not duly authorised, that officer, having acted ille-
gally, is liable to an action by civil law. Civil M. viii
courts do not, however, interfere with errors in mili- 6, 34
tary procedure as long as they are committed in
good faith, but sometimes remedy mistakes as to
jurisdiction. In 1844 the Governor of Sindh con-
firmed, without proper authority, a sentence of penal
servitude on a soldier of the Bombay army. On
appeal to the civil law the soldier was released,
on the ground that the Governor had no power to
confirm.

- 142. CONFIRMATION OF FINDING ONLY.**—When the K. 591
finding of a court-martial is confirmed, but not the
sentence, or when both are confirmed, and the sen-
tence is wholly remitted, the record of conviction
remains against the person accused, and carries
with it any penalties consequent on conviction. 206

Finding of insanity.—If a court makes a special S. 130
finding as to the insanity of the accused, it is for- R. 57
warded for confirmation. If the finding is confirmed
the accused is detained as an insane person during
H.M.'s pleasure. If the finding is not confirmed he
may be tried again.

- 143. NON-CONFIRMATION OF FINDING.**—A court-
martial through a misapprehension of the law may
word their finding of guilty in such a manner that
it virtually amounts to acquittal. In such a case

the confirming officer should refuse to confirm, and direct the acquittal to be carried out. For instance, an accused is charged with 'making a false accusation against a soldier, knowing such accusation to be false.' The court finds that the accused is guilty of the charge, with the exception that the accusation was not false—which is virtually an acquittal.

When the confirming officer is of opinion that the court has improperly overruled a special plea to its general jurisdiction, or a plea in bar of trial, which has been raised by the accused, he should not confirm the finding, and the proceedings are annulled, and the accused (not having been legally tried at all) can be tried again. R. 34
59
62

- 144. CONFIRMATION OF SENTENCE.**—The sentence must be justified by the finding. If the finding is only partially confirmed, the sentence may have to be diminished so as to make the punishment legally consequent on the finding that is confirmed. R. 54

A court-martial may in respect of alternative charges make a special finding, and leave it to the confirming officer to decide on what charge that finding legally holds good. R. 44
R. 55

The confirming officer must decide on the legal point, and should remit or commute the sentence, if it is necessary, so as to be in accordance with the finding so declared.

An officer who confirms a sentence is responsible for seeing that the sentence is carried into effect, and will, in all cases, give the necessary directions for the execution of the sentence. M. v
100

- 145. SPECIAL CONFIRMATIONS.**—In some cases confirmation is reserved or requires the approval of civil authorities. 79

The sentence on a commissioned officer of death, penal servitude, cashiering, or dismissal, must be confirmed, if in India by the Commander-in-Chief, if elsewhere by the King.

Every sentence of death (not on active service) S. 54 and *in respect of a civil offence* any sentence of penal servitude which is passed in a colony must be approved by its Governor. S. 41

Sentences of death for treason and murder (not on active service) and penal servitude, *in respect of civil offences*, which are passed in India must receive the approval of the Governor-General.

All sentences of death on active service and, *in respect of military offences*, sentences of death and penal servitude in India, and of penal servitude in the colonies, do not require to be sanctioned by the civil authorities.

146. REMARKS OF CONFIRMING OFFICER.—In the act of confirmation it is best to adhere strictly to the authorised forms, and any material deviation from them is likely to lead to a miscarriage of justice—*e.g.*, ‘I confirm the finding and mitigate the sentence to . . .’ was held to be invalid as regards the sentence.

In ordinary cases confirmation should be effected R. 51 simply by the word ‘confirmed.’ The word ‘approved’ should not be added.

Any remarks of the confirming authority should be separate from and form no part of the proceedings. They will be communicated in a separate minute to the members of the court or, in exceptional cases, be made known in the orders of the command. In no case will comment be made upon a finding of ‘not guilty’ or upon the inadequacy of a sentence. K. 589

When, however, an officer who would have confirmed the finding had the trial resulted in a conviction wishes to comment on a finding of acquittal, his remarks are not to be entered on the proceedings, but are to be embodied in a letter to the Army Council (or in India the Commander-in-Chief), who will give such orders as may be necessary. K. 590

147. REFUSAL OF CONFIRMATION.—A refusal to confirm should be signified in writing on the proceedings, M. v 9

and signed by the confirming authority, and the S. 54
 reasons for the refusal may be stated. Confirma-
 tion ought only to be withheld when the provisions S. 47
 as to the assembly and constitution of the court have S. 48
 been contravened, or when the charge or finding is S. 50
 bad in law, or when a plea to jurisdiction or in bar S. 51
 of trial has been improperly overruled by a court, S. 52
 or when the accused has been unduly restricted in R. 23
 his defence, or when evidence of a nature prejudicial R. 34
 to him has been wrongfully admitted, or when a
 deviation from the Rules of Procedure has caused an R. 36
 injustice to be done to him. A refusal to confirm R. 56
 annuls the whole proceedings, and consequently there M. v 5
 is no conviction and the accused can be tried again ; 62
 but it is obvious that this course should only excep-
 tionally be adopted.

148. OVERRULING OF CONFIRMING OFFICER.— S. 57
 After promulgation when confirmation is complete R. 126
 the sentence may be mitigated, remitted, or com- 212
 muted by the King or the following authorities, who M. v 98
 must hold a position not inferior to that of the
 authority confirming the sentence :—

The Army Council, the Commander-in-Chief in India,
 the general or other officer in command both at home
 or abroad, and any prescribed officer.

If after confirmation and promulgation some of the R. 54
 charges or findings are found to be invalid, the above
 authorities should take the invalidity into considera-
 tion and mitigate the sentence accordingly.

If again, the sentence is found to be invalid, the
 above authorities may pass a valid sentence, which
 shall have the same effect as if passed by the court-
 martial. The punishment awarded must not be
 greater than that mentioned in the invalid sentence.

The fact of an officer having confirmed a court-
 martial does not prevent him exercising the power
 of remission, etc., after the proceedings are promul-
 gated, provided that he is one of the authorities em- S. 57

powered to do so. The commanding officer who confirms a regimental court-martial is not one of the authorities specified, and therefore has no power after promulgation to alter the sentence.

It should be noted that if a *material illegality* is found *after* the proceedings are confirmed and promulgated, the person under sentence is relieved from all the consequences of his trial by order of the superior authority who has power to deal with a sentence after it has been confirmed. K. 591
62

If the proceedings can be legally sustained, but an irregularity has occurred, the conviction may be allowed to take effect, but the confirming officer or other prescribed authority will consider what reduction of the punishment (if any) is due to the person under sentence. K. 591

When a special finding on an alternative charge has been confirmed, a superior authority may overrule that finding, and cause a finding in accordance with the other alternative to be recorded. The sentence should be remitted or commuted to suit such new finding. R. 55

Generally speaking, a permanent authority can do *after* promulgation everything that a confirming officer can do previous to it.

When an accused has been *legally* tried and convicted, and it is afterwards found out that there has been a miscarriage of justice and that he is innocent, application should be made to headquarters for a 'King's pardon.'

- 149. PROMULGATION OF PROCEEDINGS.**—After confirmation the proceedings are forwarded to the commanding officer of the accused for promulgation. The charge, finding, sentence, confirmation, and any recommendation to mercy are usually read out on parade in the presence of the soldier under sentence. R. 53
K. 593
S. 53

The result of the court-martial is notified in the regimental orders, and occasionally in general or

district orders, at the discretion of the superior authority.

Forwarding of.—The date of promulgation should be recorded on the proceedings, which are then forwarded with a covering letter. K. 594

The proceedings of general courts-martial held abroad, and those of all district courts-martial are to be forwarded as soon as possible after promulgation to the judge-advocate general. Delay in transmission exceeding one month must be explained by a special report. The proceedings of regimental courts are kept with the regiment until after the next general inspection, when they are forwarded to the officer in charge of records. K. 596 73 74 K. 1928

150. CORRECTION OF PROCEEDINGS.—The record of the proceedings may be corrected in minor points after confirmation or promulgation, provided that no injustice is thereby done to the person under sentence. The authority competent to deal with the proceedings at the period when the error is discovered may order the president of the court to sign a certificate rectifying the mistake, and the certificate is attached to the *original* proceedings. In a recent court-martial the words, 'the president and members were duly sworn' were omitted, and the error was rectified by a certificate from the president declaring the omission. In another case it was found on promulgation that the president had omitted to sign the proceedings. The confirming officer thereupon directed the president to attach a certificate to the proceedings to the effect that the sentence had been duly passed by the court on the named date, but that he had accidentally forgotten to sign the record. 140 134

151. LOSS OF PROCEEDINGS.—If the original proceedings of a court-martial or any part thereof are lost they may be replaced by a certified copy. If there R. 100

is no such copy, and sufficient evidence of the charge, finding, sentence, and transactions of the court can be procured, that evidence may, *with the assent of the accused*, be accepted instead of the original proceedings or part thereof lost. The finding and sentence in the above case, if requiring confirmation, may be confirmed.

If the proceedings have not been confirmed and there is no such copy or evidence, or the accused refuses his consent to the above course, he may be tried again, and the finding and sentence of the previous court shall be null.

Where the proceedings of a court-martial have been confirmed and are lost before promulgation, R. 100 does not apply. The finding and sentence are valid after confirmation, but no action can be taken to carry out the sentence except after proof by sufficient evidence of the loss of the proceedings, of the charge, plea, finding, sentence and confirmation.

CHAPTER XVIII

CRIMES AND PUNISHMENTS

152. OFFENCES PUNISHABLE BY MILITARY AND CIVIL
COURTS AND OFFENCES OF RESERVE AND TERRI-
TORIAL FORCES.

152. OFFENCES PUNISHABLE BY MILITARY 153
COURTS.—The various offences against military law, **193**
together with the maximum punishment that can be
awarded for them, are described in detail in the
Army Act, the Reserve Forces Acts of 1882-1906,
and the Territorial and Reserve Forces Act of 1907, to
which reference should be made in any particular case.
In the following tables the crimes and their punish-
ments are systematically grouped.

Offences committed by Persons subject to Military Law which can be punished by Military Courts.

Section	Headings	Crimes	Maximum Punishment
4	Offences in relation to the enemy	<ol style="list-style-type: none"> 1. Shamefully abandoning post 2. Shamefully casting away arms 3. <i>Treacherously</i> holding correspondence with the enemy 4. Assisting or harbouring enemy 5. Voluntarily aiding enemy when a prisoner of war 6. Knowingly committing an act which imperils the success of the forces 7. Cowardly misbehaviour before enemy 	
6	Offences committed on active service which are punishable more severely on active service than at other times <i>Otherwise cashiering or imprisonment</i>	<ol style="list-style-type: none"> 1. Leaving commanding officer to plunder 2. Leaving guard or post without orders 3. Forcing safeguard 4. Forcing or striking sentinel 5. Impeding or refusing to assist provost-marshal 6. Using violence to bringer of supplies, or person, or property of inhabitants 7. Breaking into a place for plunder 8. <i>Intentionally</i> causing false alarms 9. <i>Treachery</i> about parole, watchword, or countersign 10. Irregularly appropriating supplies contrary to orders 11. Sleeps on, is drunk on, or leaves his post when a sentry 	Death
7	Special offences	(a) Mutiny and sedition	
12		(b) Desertion (on active service)	
8		(c) Violence to a superior officer <i>in execution of his office</i>	
9		(d) <i>Willful</i> defiance in disobeying the lawful command given personally by superior officer in execution of his office	

5	Offences in relation to the enemy	1. Leaving ranks without orders 2. Wilfully damaging property 3. Being taken prisoner through carelessness or disobedience, and not rejoining when able 4. <i>Without due authority</i> holding correspondence with enemy 5. Spreading reports calculated to alarm 6. Using words creating alarm or despondency . .	Penal servitude
8	Offences committed on active service which are punishable more severely on active service than otherwise	1. Violence, or threatening language to a superior officer 2. Disobedience to lawful command of a superior officer	
9	<i>Otherwise cashiering or imprisonment.</i>		
12	Offences punishable more severely for a second offence than a first	1. Desertion (not on active service). Second offence . 2. Fraudulent enlistment. Second offence .	
13	<i>First offence—imprisonment.</i>		
17	Offences in regard to public property	Embezzlement	
20	Offences in regard to a prisoner punishable more severely when wilfully committed	1. <i>Wilfully</i> releasing a prisoner 2. <i>Wilfully</i> allowing a prisoner to escape	
	<i>Otherwise—imprisonment.</i>		

Offences committed by Persons subject to Military Law which can be punished by Military Courts—continued.

Section	Headings	Crimes	Maximum Punishment
12 13	Offences punishable more severely for a second offence than a first . <i>Second offence—penal servitude.</i>	1. Desertion (not on active service). First offence . 2. Fraudulent enlistment. First offence . . .	Imprisonment
14	Offence in relation to desertion	Assistance to or connivance at desertion . . .	
18	Disgraceful conduct (of soldier)	1. Malingering, maiming, or aggravating disease . 2. Theft or embezzlement . . . 3. Fraudulent or unnatural crimes . . .	
20	Offence in relation to a prisoner not wilfully committed <i>If wilfully committed—penal servitude.</i>	1. Without proper authority releasing a prisoner . 2. Without reasonable excuse allowing a prisoner to escape . . .	

Imprisonment

23	Offences in relation to supplies	Dealing corruptly in regard to sutlers or supplies to the forces
24	Offences as to equipment of soldier	1. Losing by neglect or making away with any article of his kit, or equipment, or making away with his medal 2. Ill-treating his horse 3. Wilfully injuring public, regimental, or soldiers' property
25	Offences in relation to false documents, declarations, and statements	1. Knowingly making false returns or reports 2. Fraudulently making away with documents 3. Making false declarations officially 4. Making false accusations 5. Making false statements when complaining 6. False confession of desertion (soldier) 7. False statements to get furlough (soldier)
27	
29	Perjury	Perjury
32	Offences as to enlistment {	1. Illegal enlistment of a man discharged from the service in disgrace
33	2. Wilful false answers to attestation questions before justice
34 {	3. Improper enlisting of a man 4. Violating regulations as to enlistment and attestation

Offences committed by Persons subject to Military Law which can be punished by Military Courts—continued.

Section	Headings	Crimes	Maximum Punishment
6	Offences committed <i>not on active service</i> which are punishable more severely on active service than at other times	Crimes : <i>vide s. 6 and ante</i> , p. 138	
6 (2)	<i>On active service—death</i> Offences in respect of military service	1. <i>Negligently</i> causing false alarms 2. Without good excuse making known watchword	
8	Offences committed <i>not on active service</i> which are punishable more severely on active service than at other times	1. Violence or threatening language to a superior officer 2. Disobedience to lawful command of a superior officer	
9	<i>On active service—penal servitude.</i>		
10	Minor cases of insubordination and disobedience	1. Being concerned in a fray, resists arrest 2. Resisting against lawful custody 3. Breaking out of barracks (soldier) 4. Neglect of orders	
11	Absence from duty without leave	1. Absence from parade or without leave 2. Absence beyond garrison limits or from school (soldier)	
15		Behaving in a scandalous manner unbecoming the character of an officer and gentleman (peremptory punishment)	
16	Scandalous conduct of an officer		Cashiering in case of an officer; imprisonment in case of a soldier

Cashiering in case of an officer; imprisonment in case of a soldier

19	Drunkenness	Drunkenness on or off duty
21	Offences in relation to a prisoner	1. Unnecessarily detaining a prisoner
22		2. Not reporting committal of prisoner within twenty-four hours
		3. When on guard not reporting as to prisoner within twenty-four hours
26	Offences in regard to returns	4. Escaping or attempting to escape from lawful custody
28	Offences in relation to courts-martial	1. Signing returns in blank
30	Offences in regard to billeting and impressment of carriages	2. Refusing to make returns
31	Disloyalty	Refusing to attend, take the oath, produce documents, answer questions, and every contempt of court
35	Injurious disclosures	<i>Vide Act</i>
36	Ill-treating soldiers (by officers and non-commissioned officers)	Using traitorous or disloyal words
37		Injurious disclosing movements, etc., of H.M.'s Forces
		1. Ill-treating soldiers
38	Duelling and suicide	2. Unlawfully detaining pay
		1. Fighting a duel
39	Refusing to aid civil power	2. Attempt at suicide
40	Conduct to the prejudice of military discipline	Refusing or neglecting to aid the civil power
		Any act to the prejudice of good order and military discipline not specially mentioned in this Act

NOTE.—A court-martial can try all civil offences committed by persons under military law, subject to certain restrictions as to treason, treason-felony, murder, manslaughter, and rape. (S. 41.)

Summary of Offences exceptionally treated by Military Courts.

Section	Summary of Offences	How dealt with—Maximum Punishment
6	Certain acts of serious misbehaviour	(a) On active service—death (b) Otherwise cashiering or imprisonment
8	Violence to superior officer <i>in execution of his office</i> Violence, or using threatening or insubordinate language to superior officer {	Death (a) On active service—penal servitude (b) Otherwise cashiering or imprisonment
9	<i>Willful</i> defiance in disobeying the lawful command given <i>personally</i> by superior officer <i>in execution of his office</i> Disobedience to lawful command given by superior officer	Death (a) On active service—penal servitude (b) Otherwise cashiering or imprisonment
12	Desertion	(a) On active service—death (b) Otherwise—1st offence, imprisonment 2nd offence, penal servitude
13	Fraudulent enlistment	1st offence, imprisonment 2nd offence, penal servitude

16	Scandalous conduct of an officer . . .	Peremptory punishment ; must be cashiered
19 44 46	Drunkenness	Must be summarily dealt with unless the offence was committed on active service or on duty, or after being warned for duty, or unless the offender was found unfit for duty, or unless the soldier has been guilty of drunkenness on not less than four occasions in the preceding twelve months
9		
20	Releasing or otherwise permitting the escape of a prisoner	If wilfully done—penal servitude If otherwise—imprisonment.
28	Contempt of Court	(1) The offender to be tried by <i>another</i> court, and suffer cashiering or imprisonment (2) If the offender creates a disturbance in court, the court may order him to be imprisoned, or in case of a soldier to undergo detention, for 21 days

Offences against the Army Act which can be punished by Civil Courts.

Section	Headings	Crimes	Maximum Punishment
98	Offences against enlistment	1. Unlawful recruiting or improper interference with recruiting	Fine of 20 <i>l</i> .
99		2. False answer on attestation	Three months' imprisonment
109	Offences in relation to billeting	1. Improperly billeting, neglecting or refusing to properly billet, or receiving bribes in the matter (Of constable.)	Fine of 10 <i>l</i> .
110		2. Refusing to billet, or giving bribes to escape billeting (Of innkeeper.)	Fine of 5 <i>l</i> .
111		3. Offences against billeting mentioned in S. 30 (Of officer or soldier.)	Fine of 50 <i>l</i> .
119		4. Refusing to pay for billets, or damaging innkeeper's property (By officer or soldier.)	Must pay the amount with costs if brought before civil court
121		5. Fraudulent claim of billets	Three months' imprisonment or 5 <i>l</i> . fine

116	Offences in relation to impressment of car- riage	1. Improperly impressing carriage, refusing to properly impress carriage, or receiv- ing bribes in the matter (Of constable.)	Fine of 20 <i>l</i> .
117		2. Refusing to furnish carriage, or giving bribes to escape impressment (Of innkeeper.)	Fine of 10 <i>l</i> .
118		3. Offences against impressment mentioned in S. 31 (Of officer or soldier.)	Fine of 50 <i>l</i> .
119		4. Refusing to pay for carriage or damage in respect of carriage impressed (Of officer or soldier.)	Must pay the amount with costs if brought before a civil court
121		5. Fraudulent claims as to impressment .	Three months' im- prisonment or 5 <i>l</i> . fine
126, 129	Offences in relation to proceedings of court- martial	Contempt of court or perjury before a court- martial (By civilian.)	Such punishment as the civil court deal- ing with the offence can award for it, if committed against itself

Offences against the Army Act which can be punished by Civil Courts—continued.

Section	Headings	Crimes	Maximum Punishment
142	Offences as to personation	Falsely personating a man belonging to the forces	Three months' imprisonment or 25 <i>l.</i> fine
143	Offences as to tolls	Improperly demanding and receiving tolls from soldiers	Fine of 5 <i>l.</i>
152	Offences in relation to desertion	1. False confession of being a deserter . 2. Inducing or assisting a soldier to desert .	Three months' imprisonment Six months' imprisonment
155	Miscellaneous offences .	1.* Trafficking in commissions, promotions, or exchanges 2. Buying from or assisting a soldier to make away with his equipment or kit or detaining his certificate for pension or reserve pay as a security for debt	Six months' imprisonment or 100 <i>l.</i> fine 1st offence, 20 <i>l.</i> fine and treble value of property; 2nd offence, fine as before or six months' imprisonment
156			

* An officer who is convicted of this offence by a court-martial can be dismissed the service.

Offences of Persons who may or may not be subject to Military Law.

Headings	Crimes	Maximum Punishment
R.F.A. 15. S.R. 165. Offences of men of the army and special reserve	<ol style="list-style-type: none"> 1. Desertion, in failing to appear when called out on permanent service or in aid of civil power 2. Absence without leave, in failing to appear when called out on permanent service or in aid of civil power, or when called out for training 	By military courts the punishment authorised by A.A. for like offence
R.F.A. 6, S.R. 174. Offences of men of the army reserve and special reserve as far as applicable	<ol style="list-style-type: none"> 1. Failing to comply on two consecutive occasions with orders referring to payment of reserves 2. Failing to attend at any place when duly ordered 3. Failing to comply with orders issued by virtue of R.F. Act 4. Being insubordinate to a military official who is carrying out provisions of R.F. Act 5. Fraudulently obtaining pay or allowances 	By civil court, fine of 25 <i>l.</i> or imprisonment for its non-payment
S.R. 161. Offences of men of the special reserve	False answer on attestation	By court-martial, S. 33 By Civil Court, S. 99

Offences of Persons who may or may not be subject to Military Law.

Heading	Crimes	Maximum Punishment
Offences of men of the Territorial Force (when not embodied), T.F.A. 10, 11, 20, 21, 22, 24. T.R. 247, 249	1. Enlistment of men discharged with ignominy from army or navy	By military courts punishment as authorized
	2. Enlistment contrary to regulations	By civil courts fine of 20 <i>l</i> . Imprisonment up to 3 months
	3. Fails to appear on embodiment	
	4. Fails to appear at training or drills	
	5. Injury to or loss of public property	By civil courts. Fine of 5 <i>l</i> . and make good loss or damage

CHAPTER XIX

CRIMES

153. CLASSIFICATION OF OFFENCES. 154. FORCING A SAFEGUARD. 155. MUTINY—Limitation as to Trial. 156. INSUBORDINATION. 157. SEDITION. 158. VIOLENCE TO A SUPERIOR—Superior Officer—Offer of Violence—Execution of his Office. 159. INSUBORDINATE LANGUAGE. 160. DISOBEYING LAWFUL COMMAND—Lawful Command—Military Command—Neglect of Orders.

153. CLASSIFICATION OF OFFENCES.—In the first M. iii 2 part of the Army Act, which treats of discipline, are S. 155 enumerated all the offences for which officers or soldiers in their military capacity are punishable by a court-martial (except trafficking in commissions). The principle of classification adopted consists in grouping together offences of a similar character and ranging the various groups as between themselves in a manner intended to impress the soldier with their relative military importance. For example, the Act begins with ‘offences in respect of military service’ (ss. 4-6), and these are followed by ‘mutiny and insubordination’ (ss. 7-11). by way of showing that misbehaviour in the field, mutiny, and insubordination rank first among military offences.

The above headings are followed by—

Desertion, fraudulent enlistment, and absence without leave (ss. 12-15) ;

Disgraceful conduct (ss. 16-18) ;

Drunkenness (s. 19) ;

Offences in relation to persons in custody (ss. 20-22).

Offences in relation to property (ss. 23, 24) ;

Offences in relation to false documents and statements (ss. 25-27) ;

Offences in relation to courts-martial (ss. 28, 29) ;

Offences in relation to billeting (s. 30) ;

Offences in relation to impressment of carriages (s. 31) ;

Offences in relation to enlistment (ss. 32-34) ;

Miscellaneous military offences (ss. 35-40) ;

Offences punishable by ordinary law (s. 41).

The majority of the offences require no comment beyond that afforded by the notes appended at the end of each section in the Army Act. Some of the crimes, however, require a more detailed notice, which is here given.

- 154. FORCING A SAFEGUARD.**—Up to 1829 the forcing S. 6 of a safeguard was punishable by death without alternative. The term safeguard has been differently interpreted, but for the purposes of this section it may be defined to be a party of soldiers who are detached by a commanding officer for the purpose of protecting property or persons from the operations of his own troops. Any soldier of such party when in the performance of this duty is a part of the safeguard, and to force him is as criminal as to force the whole party.

In 1811 the Duke of Wellington placed safeguards in certain villages in Spain to prevent his troops from pillaging them. In the invasion of France in 1870 the Prussians protected the chateaux of some of their friends in a similar way.

- 155. MUTINY** implies collective insubordination, or a S. 7 combination of two or more persons to resist or to M. iii 4 induce others to resist lawful military authority. A man by himself cannot mutiny, as it is essentially a

joint act. At the same time a man might be charged singly with failing to inform his commanding officer of a mutiny, or with endeavouring to seduce a soldier from his allegiance.

Limitation clause.—A man can always be tried for S. 158 mutiny irrespective of the amount of time which has S. 161 elapsed since the commission of the offence, or of 58 the fact that he has ceased to be subject to military law.

156. **INSUBORDINATION** is the mutinous act of an S. 8 individual. Several soldiers may commit at the same S. 9 time and place acts which would come under the S. 10 general head of insubordination. This, however, M. iii 5 does not constitute mutiny, which manifests itself when there is a *combined intention* to rise against military authority.

157. **SEDITION** consists in exciting disaffection against S. 7 constituted authority or attempting by unlawful M. iii means to procure alteration of the law, or inciting 6 persons to commit any crime in disturbance of the peace or promoting discontent or illwill between different classes of H.M. subjects.

Sedition covers a far greater variety of offences than mutiny, and includes all tumultuous or disorderly demonstrations which have a mutinous tendency.

In the case of mutiny there must be proof of direct resistance or disobedience, or intention to carry out acts which would lead to them. Sedition would refer to acts which do not go quite so far.

‘For instance, each one of a number of men going in a body to a superior in a menacing manner in order to induce him to release a prisoner or mitigate his punishment, joins in sedition.’

158. **VIOLENCE TO A SUPERIOR.**—Using or offering S. 8 violence to a superior officer in execution of his office is so grave an offence that the meaning of the words constituting it require exact definition.

The term *superior officer* means not only a superior S. 190 in rank but also a senior in the same grade where that seniority gives power of command according to the usages of the service; but one private soldier can never be the 'superior officer' of another. It should be clearly proved in the evidence that the accused knew that the person who was the subject of the offence was his superior officer. A naval officer on shore or a prison warder or a nurse at a military hospital or a military policeman as such is not a *superior officer* within the meaning of the Act.

When a soldier strikes a non-commissioned officer (being his superior officer) of the military police it will often be expedient to charge him under S. 10 instead of S. 8.

'*Offer of violence*' implies any threatening act or gesture amounting to an attempt to use violence.

It must be clear that the attempt, if not prevented, would in reasonable probability lead to an act of violence.

If a man makes threats or uses threatening gestures, and there is no apparent probability of his being able to carry out his intention, he could not be charged with an offer of violence, but would be tried for using either threatening or insubordinate language, or under S. 40.

A soldier shaking his fist at an officer on parade out of an upper-storey barrack-room window would not be guilty of an offer of violence, as there is no probability of his being able to injure him. If, however, a soldier aimed at an officer with a loaded rifle, or if he made an unsuccessful attempt to strike him in an orderly-room, he might be charged with offering violence. A soldier who stands in the corner of a barrack-room with a fixed bayonet and dares anyone to approach him does not 'offer violence,' while a soldier who strikes the charger on which an officer is seated, or who spits at an officer, does come under this clause.

When a soldier commits an insulting or insubordinate act, which does not amount to an 'offer of violence,' such as throwing down his arms on parade, or throwing away his cap when coming out of an orderly-room, he would usually be charged with the 'threatening' or 'insubordinate' language he used, and the acts or gestures would be circumstances that might lead the court to inflict a more severe punishment. If, however, no language was used that could be charged under this section, the offender would be tried on a charge of conduct to the prejudice of good order and military discipline.

S. 40

'Execution of office.'—The fact that the insertion of this expression in a charge of offering violence to a superior renders the offender liable to punishment of death makes it expedient that the charge should not be so worded if there is any doubt as to the superior being in execution of his office.

It is somewhat difficult to define the exact term. It is clear that an officer in uniform, or a non-commissioned officer in or about a military quarter, is in execution of his office when he exercises his ordinary duties of military command and supervision.

An officer in plain clothes may or may not be in execution of his office. When doing duty with troops he would be so considered, provided the offender had reasonable cause to know that he was an officer, and this would have to be proved in evidence.

'Two soldiers met an officer in plain clothes in the dark and assaulted him; he then ordered them to desist, stating that he was Lieut. — of the Royal Artillery (the soldiers belonging to a line regiment in the same garrison), whereupon they said they did not care, and continued to assault him.' The officer was held to be in the execution of his office, as the soldiers had reasonable cause to believe that he was an officer from his statement.

An officer on leave in plain clothes would only in very exceptional cases be deemed in execution of his office.

Again, the mere fact of being in uniform does not of itself imply that a superior is always on duty. For instance, in the social intercourse of officers or non-commissioned officers among themselves, cases might arise where violence was offered to a superior, and the circumstances would not justify the conclusion that he was in a position to exercise military command, and therefore in execution of his office. Similarly, a non-commissioned officer would clearly not be in execution of his office when committing an illegal act, such as a felony.

It may be taken in general that striking or using violence to any superior officer by a soldier over whom it is at the time the duty of that superior officer to maintain discipline, would be striking or using violence to him in the execution of his office. A similar offence of a minor character arises when a soldier offers S. 10 resistance to any lawful custody in which he is placed.

- 159. THREATENING OR INSUBORDINATE LANGUAGE.**—The language used must be in substance and effect recounted in the charge. In order to charge a man under this section it must be clear that the words were deliberately used with the intention to be insubordinate or insulting or disrespectful, and that the accused knew that his words could not help being heard. Due regard must be paid to the actual circumstances of the case, and a hasty or angry expression or language used by a man when drunk which he would not probably employ if sober, or expressions made use of by a man when on his defence before a military tribunal, should not be thus charged, but if necessary punished under S. 40. S. 8 M. v 86

In all insubordinate acts it should be kept in mind K. 554 that the greater the distance in position between the offender and the superior, the greater will be the offence. Language which, used by a soldier to a non-commissioned officer, would be merely disrespect- 126

ful, might, if used to an officer, be treated as insubordinate.

Insubordinate language must be addressed to the superior officer, or in such a manner that he is intended to hear it. Insubordinate or threatening language about a superior, if used to (in the sense that it is intended to be heard by) another superior, constitutes the offence of 'using insubordinate language,' under this section. The words must be used with an insubordinate intent and be insulting or disrespectful, and it must reasonably appear that they were intended to be heard by a superior.

Improper language which does not amount to insubordinate language, or insubordinate language which cannot be proved to be used to a superior officer, must be charged under S. 40.

160. DISOBEYING LAWFUL COMMAND.—In order to S. 9
convict under the most serious of the charges in this M. iii 8
section it must be clearly proved that the superior was in execution of his office, that the command was *lawful*, that it was delivered *personally*, and that it was disobeyed under circumstances showing a wilful defiance of authority.

The refusal to obey must be deliberate and obstinate, so as to show in the clearest manner an intention to defy and resist superior authority.

The disobedience must be immediate and proximate to the command, and actual non-compliance must be proved.

A soldier who is awarded seven days' C.B. and absents himself from defaulter's drill, or a sergeant who is ordered to attend dinners daily and who fails to do so on two occasions, could not be charged under this section.

A soldier detailed for a future guard says, 'I will not do it.' He will be confined, and may be charged with insubordinate language, but the mere fact of his confinement prevents compliance with the order

received, and he cannot, therefore, be tried for disobeying it.

Non-compliance with an order arising from misapprehension, stupidity, forgetfulness, or negligence is not an offence under this section, nor could a soldier be charged under it for an offence such as declining to sign his accounts on the ground that they are incorrect.

To establish the offence of disobedience under the second clause of the section it is not requisite to prove that the command was given personally by a superior. It is sufficient to show that it was given by the deputy or agent of the superior, whom the accused might reasonably suppose to have been authorised to notify to him the command of his superior. But it must be a specific command to an individual, and must be given as being the command of a superior.

‘*Lawful command.*’—There has always been a good deal of discussion as to what is meant by a lawful M. iii
command. It appears, however, undisputed— 10

(1) That the command is to be given by a superior who has the right to do so.

(2) That it refers to some matter connected with military duty, and is, in fact, a military command.

(3) That it is not contrary to civil law, and is justified by military law and custom.

So long as the orders of a superior are not obviously and decidedly in opposition to the law of the land, or to the well known and established customs of the army, so long must they meet prompt, immediate, and unhesitating obedience.

No excuse as to religious scruples is any justification for refusing to obey an order. An officer cannot refuse to pay respect to what he considers a heathen ceremonial by not presenting arms, if he is given an order to do so. Nor can an officer refuse to attend with his men any form of worship at which

he may be ordered to be present in the usual course of military duty.

Military command.—It is difficult to lay down exactly the limits of a strictly military command. It should be quite clear, in order to charge a man under this section, that the refusal to obey the command in some way interferes with a public military duty.

O'Dowd gives a good illustration of a lawful military command for the purposes of this section. An officer going on military duty orders a soldier to fetch his horse. Disobedience to such an order would render the soldier liable under this section. If, however, the officer wanted his horse to go out hunting or to take an ordinary ride for pleasure, refusal to bring it could not be treated as disobedience to a lawful command, although, of course, the soldier might be otherwise punished.

Neglect of orders.—A soldier may be charged with S. 11 neglecting to obey a standing order having a continuous operation, whether garrison or regimental, or of a like nature. Disobedience of a King's Regulation or of an Army Order would be punished under S. 40, unless such regulation or order were formally republished as a garrison or regimental order.

Ignorance of a published order is not a valid defence, but the existence of the order and the fact of the neglect must be proved. A written order cannot be proved by oral testimony, and a copy of the order contravened must be produced on oath to the Court.

CHAPTER XX

CRIMES—(continued)

161. DESERTION—Judged by Time—Judged by Distance—Limitation as to Trial. 162. RESERVE AND TERRITORIAL FORCES. 163. DESERTION ON FURLOUGH. 164. ATTEMPTING TO DESERT—Persuading to Desert—Assisting to Desert. 165. PROOF OF DESERTION. 166. VARIATION IN FINDING. 167. PENALTIES ON CONVICTION—Forfeitures—Restoration. 168. REPEATED OFFENCES. 169. PROCEDURE AS TO DESERTERS. 170. FRAUDULENT ENLISTMENT—Limitation Clause. 171. ATTEMPTING FRAUDULENT ENLISTMENT. 172. REPEATED OFFENCES. 173. DISPENSATION WITH TRIAL. 174. FALSE ANSWERS ON ATTESTATION. 175. ILLEGAL ENLISTMENT. 176. ABSENCE WITHOUT LEAVE—On Furlough—Breaking out of Barracks. 177. OVER TWENTY-ONE DAYS—Not Desertion. 178. UNDER TWENTY-ONE DAYS. 179. RESERVE AND TERRITORIAL FORCES. 180. TRIAL BY CIVIL COURT.

161. DESERTION is constituted when a man absents S. 12 himself with the *intention* either of not returning M. iii to military duty in any corps, or escaping some 13 important service, such as active service, embarkation for foreign service, or service in aid of the civil power.

A soldier detailed in regimental orders as a 'waiting man' for a draft for service abroad is held to be 'under orders for service abroad.'

The crime of desertion was recognised by the civil law and punished as a felony before the passing of

the first Mutiny Act brought a more speedy method of dealing with it into action.

The various Mutiny Acts authorised a maximum penalty of death for the offence, and finally the Army Act provided a punishment in accordance with the conditions under which the desertion was committed—*i.e.*, death, penal servitude, or imprisonment, according to circumstances.

Judged by time.—The length of *time* a man is absent M. iii 14 has nothing to do with desertion. Cases have occurred where a lengthy absence was obviously involuntary, and the offender had no intention of leaving the service. For instance, a corporal of an English battalion serving in Canada was virtually kidnapped and made to serve as a soldier during the war in the United States between North and South, and was unable to get back to his regiment until after the close of the war. Again, a gunner at a seaport town in England drifted out to sea in a small boat and was carried to Australia in an outward-bound ship, and was unable to get back for many months.

On the other hand, a soldier who was only a few hours absent might be arrested in plain clothes on board a ship bound for a foreign country, and it would be quite clear that he intended to desert.

Judged by distance.—Neither can desertion be invariably judged by *distance*. A soldier may absent himself and depart to a very considerable distance, but the intention to return may be clear, whereas he may scarcely quit the camp or barrack-yard and the evidence of desertion may be complete—as if a soldier were detected in passing through the outposts clandestinely, or crossing a frontier, or being taken in disguise with letters on his person indicating his intention. The perpetration of any heinous crime, coupled with absence without leave and the forcible capture of the offender—though the absence be of short duration and the distance inconsiderable M. iii 15

--may lead to the belief that the prisoner had no intention of returning.

A man who, on the eve of the embarkation of his regiment for service abroad, or when called out to aid the civil power, conceals himself in barracks, can be tried for desertion, as his intention to evade the important service on which he was ordered is apparent.

Limitation clause.—A man can always be tried for desertion *on active service*, irrespective of the amount of time that has elapsed between the commission of the offence and the arraignment of the accused. For desertion *not on active service* a man can similarly be always tried, except when he has served, after committing the offence, three years continuously in an exemplary manner before the charge is made against him, in which case he is not liable to trial. If a trial for desertion takes place more than three years after the commission of the offence no other charge (such as making away with kit) must be preferred at the same time.

A civil court cannot try a man for deserting from the regular forces, as the Acts referring to this offence were repealed in 1863. In certain cases, however, men of the reserve forces can be tried and punished for desertion by a civil court.

162. DESERTION—RESERVE AND TERRITORIAL FORCES.—Men of the reserve and territorial forces are of course liable for trial for desertion when their corps or they themselves individually are subject to military law.

A man in the territorial force, whether otherwise subject to military law or not, can be tried for desertion for failing to appear when the territorial force is assembled for embodiment, and a man belonging to the reserve forces is similarly liable to trial when he is called out either on permanent service or in aid of the civil power.

In both cases they can if necessary be tried by a

court of summary jurisdiction and on conviction are punishable by fine and imprisonment. 152

163. DESERTION ON FURLOUGH.—Discussion has more than once taken place as to the possibility of a man deserting *while on furlough*. It is clear that a man is still under orders when on furlough, and is liable to be called on to rejoin at any moment. Hence, if he commits any act, such as disguising himself or going where orders cannot reach him, he shows an intention of quitting the service; and if a man acts so that orders cannot reach him, he illegally absents himself from the place in which he ought to be. M. iii 17 K. 1309

The common example given is that of a soldier on furlough who is found on board an outward-bound ship with a passenger ticket. According to the above reasoning he might be tried for desertion, but it will always be in the power of the court, if they are in doubt, to convict the accused of the similar offence of attempting to desert or of absence without leave.

S. 56

164. ATTEMPTING TO DESERT is punishable to the same extent as desertion. To prove desertion it is necessary to show the absence without leave and the intention not to return. Cases of attempting to desert will arise when the intention is evident but the absence does not occur. For instance, a man might be caught in plain clothes attempting to slip past a sentry, or a case might occur in which a man had made arrangements to disguise himself and had taken a ticket by rail or otherwise to a distant place. S. 12

The evidence should be sufficient to prove that the carrying out of the *attempt* with which the prisoner is charged would lead to his desertion.

Persuading to desert.—Persuading or endeavouring to persuade a man to desert is punishable to the same extent as desertion. S. 12

Assisting to desert.—Assisting or conniving at desertion is a lesser offence. In this case a man must S. 14

actually have deserted or attempted to desert in consequence of the assistance or connivance made.

Any person persuading or assisting a soldier or a man of the reserve forces or territorial force to desert is liable to imprisonment by a civil court for a term not exceeding six months' hard labour.

S. 153

R.F.A.

17

T.F.A. 20

- 165. PROOF OF DESERTION.**—The mere fact of a man surrendering himself is not a proof that he did not intend to desert. It is quite possible that he might have surrendered from changing his mind or from finding it impossible to effect his escape.

M. iii 19

When a soldier pleads guilty to a charge of desertion it should be made clear to him that the question of *intention* is the substance of the charge, and that the court are considering something more than his illegal absence. Soldiers commonly think that the crime alleged against them is mainly in reference to their illegal absence, and thus plead to a wrong issue.

M. iii 13

177

The ordinary proofs which would satisfy a court as to a man's intention to desert are his having expressed an opinion to that effect, being found without proper cause in plain clothes or in disguise, having taken a passage to a distant place, absconding after commission of a serious crime, being found in hiding, having made arrangements for sale of his property, etc.

Fraudulent enlistment is an offence allied to desertion not on active service, and is similarly punished. Formerly, a man who absented himself from his corps and fraudulently enlisted in another regiment could be tried for desertion, but now it is held that in any ordinary case he cannot, as his intention to serve is evident. If, however, a man fraudulently enlists in a regiment for the purpose of avoiding a particular service (*e.g.* service abroad) he is liable to be charged with desertion.

M. iii

21

- 166. VARIATION IN FINDING.**—A prisoner charged with desertion may be convicted of attempting to

S. 56

desert or of absence without leave, and a prisoner charged with attempting to desert may be found guilty of desertion or absence without leave. When there is any doubt as to the intention not to return being sufficiently proved, the accused should be given the benefit of it and found guilty of the minor charge. It has been ruled that a soldier acquitted by court-martial of desertion could not afterwards be punished by his C.O. for the absence without leave on which the charge was based. 119

167. PENALTIES ON CONVICTION.—A soldier convicted of desertion (or fraudulent enlistment), or who confesses those offences and (being liable to trial) has his trial dispensed with, necessarily forfeits all his prior service and begins again as if he had enlisted or re-engaged at the date of conviction or order dispensing with trial :— S. 79 S. 73

Forfeitures.—Where service is forfeited it entails the loss of all advantages accruing therefrom as to good-conduct badges, deferred pay and proficiency pay, together with any medals or decorations (other than the Victoria Cross), and the annuities and gratuities belonging to them. He also forfeits his pay of every kind (and consequently service towards pension) during the time of his absence on desertion and while he is under detention awaiting trial or disposal. (Where trial is dispensed with, any forfeiture (other than prior service towards discharge) may be remitted by the order dispensing with trial). He is further liable to general service anywhere, either wholly or partly in commutation of other punishment, as the competent military authority may direct. P.W. 1096 1113 1236 1067 977 1137 K. 543 206 S. 83

Restoration.—Forfeited service will be restored upon promotion to the rank of sergeant, upon completion of three years clear of entry in the regimental defaulter book, on the recommendation of a court-martial, or on account of good and faithful service. Medals, decorations, annuities, and gratuities may S. 79 K. 273 P.W. 1093 1240

also be restored under regulations approved by the Army Council.

- 168. REPEATED OFFENCES.**—For the offence of desertion (not on active service) the higher punishment of penal servitude can be awarded for the second and any subsequent offence. It is lawful to charge an accused with any number of offences of desertion at the same time, and a conviction on more than one charge makes him liable to the higher penalty, but each charge should be on a separate charge sheet and the trials kept distinct. S. 12
172

When a man is tried on a charge of desertion, the similar offence of fraudulent enlistment may be reckoned as a previous offence, and render the offender liable to the higher penalty.

For the purposes of trial, a man charged with either of the above offences is deemed to belong to any one or more of the corps to which he has been transferred or appointed.

- 169. PROCEDURE AS TO DESERTERS.**—On reasonable suspicion a constable, or in his absence any officer, soldier, or other person, may apprehend a person whom he suspects to be a deserter from the army, or a deserter or absentee without leave from the reserve forces or a deserter from the territorial force, and forthwith bring him before a court of summary jurisdiction. When the court is satisfied that the man is a deserter or absentee the court duly commits him as such, and, forwarding a descriptive return, hands him over as soon as practicable to the military authorities. S. 154
R.F.A.
16
T.F.A.
20
S.R. 193

With a view to the detection and apprehension of deserters and absentees without leave a descriptive report, giving the fullest information possible as to the absentee, is to be sent to the editor of the 'Police Gazette.' Where there is good ground for supposing an absentee to have deserted, the report should be forwarded as soon as possible, but in no case should it be delayed beyond five days. Dupli- K. 514

cate reports should be sent to any military depots, recruiting offices or local police that may assist in apprehension.

A soldier on leave who is not heard of five days after the expiration of his furlough is reported as a deserter, as well as a man absent more than twenty-one days. In other cases the soldier is reported as an absentee, unless there is reason to believe that he is a deserter. K. 1312

If a deserter surrenders himself to any portion of his own corps, and evidence as to identification is immediately available, he may at once be taken into military custody. If a man in the uniform of a soldier surrenders himself at a military station as a deserter or absentee without leave the C.O. of the forces to which the man surrenders will obtain from him a written confession as to the facts and will investigate its truth. If the confession is true the man, if a deserter, will be sent to his own corps under escort, or, if an absentee, may be despatched to it with a warrant. A certificate as to the facts of the surrender will be sent to the man's unit without delay. K. 517

In all other cases a person *not serving*, who is apprehended on suspicion of being a deserter (in consequence of his own confession or otherwise), or who has surrendered himself as a deserter or absentee, is to be brought before a civil court for punishment under S. 152 or that he may be duly committed and delivered into military custody.

If a deserter is discovered *while serving*, the commanding officer will obtain evidence to prove the desertion in the prescribed manner and will then submit the case to the general officer in command, who will dispose of it by court-martial or otherwise and decide in which corps the man shall serve. K. 521

If a soldier makes a confession, when serving, of desertion or any offence against enlistment, and the evidence is not at once forthcoming, he may be ordered to continue at his duty till it arrives, instead K. 479

of being taken into custody. A record of the confession signed by him is kept, and the matter reported to the proper authority.

False confession.—Any person who falsely represents S. 152 himself to be a deserter from the army, or a deserter S.R. 194 or absentee from the reserve forces, shall, on summary R.F.A. 16 conviction by a civil court, be sentenced to imprisonment not exceeding three months.

If a soldier subject to military law makes a false S. 27 statement to his commanding officer as to desertion or fraudulent enlistment, or as to serving in or discharge from any of H.M. forces, he can be tried for the offence by court-martial.

170. FRAUDULENT ENLISTMENT.—A soldier in the S. 13 regular forces, a man in the territorial force when embodied, or a reserve man when called out on per- R.F.A. manent service (and therefore part of the regular 14 forces), who enlists without fulfilling the proper conditions into any of the regular, Indian, colonial, or reserve forces, or territorial force, or the Royal Navy, is guilty of *fraudulent enlistment*.

Limitation clause.—A man can always be tried for S. 161 fraudulent enlistment except when three years have 58 elapsed between the commission of the offence and the charge being made, and the offender has served K. 489 during those three years in an exemplary manner.

The only effect on the offender will then be that, as he has chosen to enter into a new contract to serve, he will be held to the terms of that contract or last attestation, and all service rendered by him prior to such last attestation will be forfeited.

The obtaining of a free kit should not form a part of the particulars of a charge for fraudulent enlistment when trial takes place after the three years' S. 13 limit.

The confession of fraudulent enlistment, false 167 statement as to fraudulent enlistment and penalties 173 on conviction of fraudulent enlistment are referred to in the paragraphs treating of desertion.

171. ATTEMPTING FRAUDULENT ENLISTMENT.— S. 40

Soldiers of the regular forces who attempt to fraudulently enlist, or make a false answer on attestation, are liable to be proceeded against before a court of S. 99 summary jurisdiction, or to be tried by court-martial for the offence.

A soldier on furlough in plain clothes who offered himself as a recruit, but was refused on the ground that it was Sunday, was tried under this heading.

172. REPEATED OFFENCES.—Fraudulent enlistment with regard to trial and punishment is similarly treated to desertion (not on active service), and can be awarded a higher punishment for a second offence.

Desertion may be reckoned as a previous case of fraudulent enlistment, but it must be remembered S. 13 that a man must have served between the date of his desertion and that of his fraudulent enlistment. Suppose, for instance, that a man deserts from a regiment and is apprehended, tried, and convicted, and sent back to his regiment at the expiration of his sentence. After doing duty for some days he again absents himself and enlists in another regiment. On being found out he would be charged with fraudulent enlistment, and the former conviction of desertion would be reckoned against him.

A man who has fraudulently enlisted in a regiment, and is then discovered to have deserted a year previously from another regiment, is only liable under ordinary circumstances to be tried for a single offence, either of desertion or fraudulent enlistment, and would in ordinary cases be charged with the latter crime.

Exceptional instances might arise in which the previous desertion was completely proved with regard to *intent*, as, for example, if the man deserted to evade foreign service. There is then no absolute bar to his being tried both for that desertion and the subsequent fraudulent enlistment, but the desertion would not count as a previous instance for the

purpose of awarding the higher penalty of penal servitude.

A soldier who has been in several regiments and fraudulently enlists in the artillery is only liable to be tried on the one charge of so doing. Where a second charge of fraudulent enlistment is made it must have reference to fraudulently enlisting in one of the previous regiments.

As a rule a soldier will be tried in his present corps, and will be held to serve on the terms of his last attestation, but if he has fraudulently enlisted in the reserve forces he will be sent back to his former corps. K. 526

- 173. DISPENSATION WITH TRIAL.**—A soldier confessing desertion or fraudulent enlistment may (if he is liable to be tried) have his trial dispensed with by competent military authority, and that authority shall order that, instead of being tried by court-martial, he shall suffer the same forfeitures and deductions from pay as if he had been convicted of the offence by court-martial. Any forfeitures or deductions of pay prescribed by Royal Warrant may be excepted by the terms of the order. An entry of the order is made in the conduct sheets, as if the soldier had been convicted by court-martial. S. 73 S. 138 167 K. 544

- 174. FALSE ATTESTATION.**—In the minor cases of illegal enlistment a man of the regular forces, reserve forces, or territorial forces, or a civilian, is liable to be tried for making a false statement on attestation either by a military or civil court, according to circumstances. S. 33 T.F.A. 10 S.R. 187 S. 99

When the offender belongs to H.M. naval forces the case should be referred to the Secretary to the Admiralty, asking whether it is desired to claim him, before taking steps to bring him to trial. K. 521

Where a man denies that he has previously served and it is found that he has served in several regiments, he can only be charged with one offence of

making a false statement, and is not subject to separate charges in regard of each such regiment.

In order to prove that a man has given a false answer on attestation, one of the attestation papers signed by the soldier must be produced in evidence. The answer must be wilfully false and an incorrect statement as to age should never be made the subject of a charge, as it is impossible to prove that a man knows his own age. There is no penalty, again, in a man enlisting under an assumed name, provided it be not done for a fraudulent purpose. An army reservist who is tried for this offence within three months of his improper enlistment into the regular forces may be charged with obtaining a free kit. A charge for making a false answer cannot be preferred before a court-martial if three years have elapsed since the date of the attestation, nor can such a charge be entertained by a civil court after six months. S. 163

- 175. ILLEGAL ENLISTMENT.**—A serious offence in connection with enlistment occurs when a man who has been discharged with disgrace from His Majesty's forces, or dismissed with disgrace from the Navy, enlists in the regular forces or the territorial forces without declaring the circumstances of his discharge. Enlisting in the special reserve after having been discharged with disgrace would usually be dealt with under S. 99, but if dealt with while subject to military law the charge may be laid under S. 33. The expression 'discharged with disgrace' means discharged with ignominy,* discharged as incorrigible and worthless, discharged for misconduct, or discharged on account of conviction for felony or of a sentence of penal servitude. In proving the offence it must be shown that the man knew that he had been discharged with disgrace; and if the offender belonged to the Navy, the actual words 'dismissed with disgrace' must occur in his record of discharge. S. 32

* 'Incorrigible and worthless' is no longer a cause of discharge from the Army. K. 392

It has been ruled that the disgrace must be by reason of some misconduct after and not before the man's previous enlistment.

- 176. ABSENCE WITHOUT LEAVE.**—A man can be S. 15 punished for absence when he goes away and stays away from the place, regiment, or barrack where he ought to be, without leave being in proper form granted to him.

It should be clear that the offender did not *intend* to quit the service or to absent himself in order to evade some particular duty. In these cases he would usually be tried on a more serious charge, if not for desertion.

Absence from one particular part of a barrack to any place within (so to speak) the same military atmosphere would not, as a rule, warrant a conviction, to justify which it is essential that the absence must be from the military supervision to which the prisoner is ordinarily subject. But if it is a soldier's duty to be in one part of the barrack and he cannot be found when wanted his absence from a part only of the barrack may amount to absence without leave.

A soldier is only liable to penalties in respect of the time during which he voluntarily absents himself. If he can prove that he was prevented by force or misadventure from returning in proper time he cannot be punished, even although such compulsory detention arose out of an illegal act.

On furlough.—A soldier on furlough who is prevented from returning by sickness or any other cause S. 173 K. 1324 can get his furlough extended for a month by applying, in accordance with regulation, to a military officer, or to a Justice of the Peace, and is not liable to punishment on account of such further absence.

If the soldier fails to rejoin he may be dealt with as an absentee. If, within five days, no satisfactory K. 1312 account of his absence is received he will be reported as a deserter.

Breaking out of barracks.—This offence consists in S. 10

a soldier quitting barracks, etc., at a time when he had no right to do so, either because he was on duty or under punishment, or because of some regulation or order; and it is immaterial whether the offence was managed by violence, stratagem, disguise, or simply by walking past a sentry unnoticed. A charge of 'breaking out of quarters' would hold good in the case of a man improperly leaving one part of a barrack for another, where he had no right to be.

A soldier who breaks out of barracks, etc., and remains absent a considerable time should be charged before a court-martial with the absence alone, and if he was a defaulter the fact should be stated in the particulars of the charge.

177. OVER TWENTY-ONE DAYS.—Illegal absence can K. 487 now be dealt with summarily by a commanding 673 officer or by a court-martial. When a soldier (other S. 72 than an absconded recruit) or a man of the reserve R. 125 or territorial forces who is subject to military law is T.F.A. 24 absent without leave for twenty-one days (and has R.F.A. not been taken into custody), a court of inquiry is 19 ordered to assemble, which takes evidence on oath sufficient to prove the illegal absence of the soldier and any deficiencies of kit that were noticed at the 274 time of his first absenting himself.

A record of the declaration of the court with regard K. 1912 to the above facts is preserved in a special regimental book, and the record thus made or a certified copy of it is admissible as evidence against the accused, when tried, or, if he is not apprehended, has the legal effect of a conviction for desertion.

Not desertion.—It is a common error to suppose K. 514 that absence without leave over twenty-one days constitutes desertion. If, however, a man is absent twenty-one days, he is reported to the police as a deserter, and if he has no valid excuse for being so long absent, he can be brought up on a charge of desertion, and it will rest for him to prove that he

did not go away with the intention of quitting the service.

The crimes of absence without leave and desertion are intimately connected, and the officer who sends the case for trial has to decide whether there is sufficient reason to believe that the absence of an accused arose from an *intention* to desert. Where desertion is the offence charged the court, if they have any doubt on the matter, can always find the accused guilty of the lesser offence. S. 56

- 178. UNDER TWENTY-ONE DAYS.**—Any ordinary case of absence without leave is usually dealt with summarily by a commanding officer, who may for this offence award detention for any period not exceeding twenty-eight days; but the number of days' detention awarded, if it exceed seven, must not be more than the number of days' absence. For absence not exceeding seven days' detention up to 168 hours may be awarded. K. 493 S. 46

- 179. RESERVE AND TERRITORIAL FORCES.**—Men of the reserve and territorial forces when not subject to military law are, in certain cases, subject to trial for absence either by a military or civil court; as, for example, when a man of the territorial force fails to appear when called out for embodiment or training, or when a reserve man does not appear when called out on permanent service or for training, or in aid of the civil power, or fails to attend at any place to which he is ordered in accordance with the regulations of the Reserve Act. R.F.A. 6, 15 T.F.A. 20

- 180. TRIAL BY CIVIL COURT.**—In all cases of desertion, absence and making false statements on attestation, and for certain offences connected with the payment of the reserve forces, men of the reserve forces, and of the territorial forces, are liable to be tried by a civil court instead of a court-martial, and are punished, according to the nature and degree of the offence, by fine or imprisonment. R.F.A. 6, 15 61 152

CHAPTER XXI

CRIMES—(continued)

181. SCANDALOUS CONDUCT. 182. EMBEZZLEMENT—Fraudulently misapplying—Stealing. 183. DISGRACEFUL CONDUCT—Theft—From Soldier—From Civilian. 184. DRUNKENNESS—No Excuse. 185. OF OFFICER—Of Non-commissioned Officer—Of Soldier. 186. JURISDICTION OF COURT. 187. MAKING AWAY WITH KIT. 188. FALSE STATEMENTS. 189. CONTEMPT OF COURT—Of Soldier—Of Civilian—Of Accused—Of Counsel. 190. FALSE EVIDENCE. 191. CONDUCT TO THE PREJUDICE OF GOOD ORDER. 192. CIVIL OFFENCES.

181. SCANDALOUS CONDUCT OF AN OFFICER.—An S. 16 officer who is convicted of behaving in a scandalous manner unbecoming the character of an officer and a gentleman *must* be cashiered, and there is no power to award any other punishment for this offence.

The essence of the offence lies in the word *scandalous*. If an officer behaves in a scandalous manner he necessarily behaves in a manner unbecoming an officer and a gentleman. The fact by itself of behaving in a manner unbecoming an officer and a gentleman is not a military offence. There appears no authority by which an officer charged under this section could be found guilty of a lesser offence, such as conduct to the prejudice of good order and military discipline, though formerly such was the custom.

Scandalous conduct may partake either of a military or social character, but in the latter case an

officer should not be charged with it unless the offence be of a character which reflects so much discredit on the officer or his corps that his removal from it is a necessity.

This section enables a court-martial to undertake in some measure the functions of a Court of Honour. It is probably for this reason that it appears to have been regarded with disfavour by the legal profession as not in accordance with the spirit of English law.

- 182. EMBEZZLEMENT.**—Embezzlement is the fraudulently converting to one's own use property received, taken possession of, or held for another. It differs from ordinary theft in being a breach of trust as well as a fraud, and can only be committed by persons acting in the capacity of clerk or servant to the party defrauded. S. 17 M. iii 24 M. vii 59

A pay-sergeant who made away with money entrusted to him for paying his company, or a canteen-sergeant who appropriated canteen money, being both in the position of clerk or servant, would be charged with embezzling it.

Fraudulently misapplying is an offence very similar to embezzlement, and is constituted when a person who is employed in the public service of His Majesty fraudulently converts any chattel, money or security entrusted to him, by virtue of such appointment, to any other purpose than the public service. M. vii 61

The following would be an instance of fraudulent misapplication :—A pay-sergeant receives money from a man of his company to put in the regimental savings bank and appropriates it. He does not steal it, because it has been given to him : he does not embezzle it, because he is neither the clerk nor servant of the owner.

Stealing, for the purposes of this section, does not refer to ordinary cases of theft, but rather to those

cases where a man has legally access to and temporary control over property, and fraudulently makes away with it. M. vii 56

It will be noticed that this section deals entirely with persons in a position of trust, such as a paymaster or pay-sergeant, and does not affect the private soldier.

With regard to pay-sergeants and other non-commissioned officers, it should be remembered that they can only be rendered liable to repay an amount for which they, strictly speaking, ought to be held responsible. K. 112

A man charged with embezzlement may be found guilty of stealing or fraudulently misapplying, and a man charged with stealing may be found guilty of embezzlement or fraudulently misapplying. S. 56

At home stations, in all cases of fraud the charge and summary of evidence must be submitted to the judge-advocate general before the trial is ordered. This does not apply to cases of simple theft.

183. DISGRACEFUL CONDUCT OF A SOLDIER.—All offences included in S. 18 come under the general heading of disgraceful conduct. A charge should not, however, be headed by the term 'disgraceful conduct' unless it be of a cruel, indecent, or unnatural kind. (5) S. 18

Theft.—Theft or larceny may be defined as the wilfully wrongful or fraudulent taking possession of the goods of another with a felonious intent to deprive the owner of his property in them.

It is now enacted that a fraudulent conversion by a bailee of goods obtained in the first instance lawfully also constitutes theft. M.vii 56

From soldier.—Owing to the manner in which soldiers live, and the opportunity they have of taking one another's property, theft from a comrade is looked upon as a very serious military offence. Hence the theft by a soldier from a comrade is generally dealt with by a court-martial, and would be visited by M. iii 23

more severe punishment than would be inflicted by a civil court.

Before charging a soldier with theft of a comrade's property, there must be a strong presumption of intention to steal as the articles may merely be borrowed, or otherwise legally obtained. Improper possession of a comrade's property can be dealt with K. 556 under S. 40.

From civilian.—It should be noticed that in order to charge for theft under this section the property stolen must belong to a public or regimental institution or to some officer or soldier. Theft from a garrison mess or institute or from a civilian must be charged under S. 41, or disposed of by a civil court. In garrison towns civilians often apply to have the case disposed of by a court-martial, as the articles stolen are either restored to the owner or their value made good by S. 75 means of the stoppages to which the prisoner is usually K. 586 sentenced.

Offences of a fraudulent nature which are not elsewhere specifically mentioned in the Act are dealt with under Sub-section 5, *e.g.* :—

A soldier fraudulently obtains a high figure of merit by firing more rounds at the target than he was entitled to use.

- 184. DRUNKENNESS.**—A person subject to military law S. 19 can be tried on a charge of drunkenness, whether committed on duty or not on duty. Drunkenness M. iii includes intoxication from the effects of opium or any 25 similar drug as well as from liquor.

The offence is more serious when committed on K. 510 duty, *i.e.*, when an offender was actually in the performance of some military duty, or was drunk on parade, M. iii 28 or on the line of march at any period from the date of departure till the date of arrival at destination.

A soldier may be continuously on duty when employed on some special service, such as aiding the civil power or rendering some public service, and

would be considered on duty while the special service lasts, even although not always actively employed.

When the offence of drunkenness is to be submitted to a court-martial it is essential to allege in the particulars of the charge any facts showing that the offender was on duty or had been warned for duty, or by reason of drunkenness was found unfit for duty (*vide* charge sheet 52).

In order to enable a court-martial to award field punishment it is necessary to allege 'when on active service.'

No excuse.—Drunkenness is, by English law, held K. 575 to be no excuse for crime. The wisdom of this is M. iii apparent, for, if it were considered a palliation, an 31 offender before deliberately committing a crime would get drunk.

On the other hand, it is evident that cases will occur when a man may commit a crime in a drunken fit which he would be loth to do if he were sober. This is especially the case in offences of insubordination and where the intention is an essential part of the crime, and although, legally speaking, the drunkenness is no excuse, yet a military court would be justified in treating the offence more leniently than would otherwise be the case.

If the charges against a soldier do not allege drunkenness, and he was drunk at the time he committed an offence with which he is charged, the prosecutor should bring out this fact in evidence.

185. OF OFFICER.—Whether the act be committed on duty or not the charge should be "drunkenness." The charge of being drunk on duty *under arms* is done away with, and it is not now necessary to bring the offence of ordinary drunkenness under the head of S. 16 scandalous conduct, or of conduct to the prejudice S. 40 of good order and military discipline.

Of non-commissioned officer.—A non-commissioned S. 183 officer (a term including lance-corporals and acting bombardiers) can be tried for drunkenness, whether

committed on or off duty. A commanding officer has, moreover, complete discretion whether to send the case for trial or not, as the obligation of dealing summarily with a private soldier guilty of simple drunkenness (as defined in the King's Regulations) does not extend to the case of a non-commissioned officer. If he disposes of the case summarily he cannot award a fine. 48

Of soldier.—The offences of drunkenness that can be tried by court-martial include every case of drunkenness on duty or when an offender is drunk after being warned for duty, or when by reason of his drunkenness he is unfit for duty, or (in cases of simple drunkenness) when he has been drunk on not less than four occasions in the preceding twelve months. S. 46

The drunkenness of a soldier is usually disposed of by a commanding officer, and cases of simple drunkenness are as a rule sufficiently dealt with by the imposition of a fine.

It is generally held that if a soldier is found to be drunk when *unexpectedly* called upon to perform some duty to which, in the ordinary course of events, he is not liable, the case should be treated as one of simple drunkenness. M. iii 29

A sentry drunk on his post should be tried under S. 6, but a stableman who is not regularly posted and relieved is not to be regarded as a sentry. S. 6

When the particulars of the charge do not make it clear that the offender is, from the circumstances of the case, liable to trial, evidence should be taken before the finding to show that he had been drunk on not less than four occasions within the preceding twelve months. K. 509

186. JURISDICTION OF COURT.—A court-martial under S. 19 has absolute jurisdiction to try the offence of drunkenness under any circumstances. The practice of dealing with offences of simple drunkenness is, however, limited by S. 46, which states M. iii 27

that a commanding officer is bound to deal summarily with a simple case of drunkenness, provided it is not more than the fourth case within twelve months, unless the soldier elects to be tried by district court-martial. 42

In addition to or in substitution of any other punishment a court-martial can order an offender to pay a fine not exceeding one pound.

When an accused elects to be tried by a district court-martial instead of having his case disposed of summarily, the court should not award a punishment greater than that which a commanding officer could, under the circumstances, inflict.

187. MAKING AWAY WITH KIT, &c.—In cases of S. 24 making away with kit or equipments alternative 219 charges are usually made when there is any doubt about the proof of the pawning, selling, etc., being sufficient. In the absence of evidence of some positive act of pawning or selling arms, equipment, clothing, etc., a charge of making away with cannot be sustained and should not be preferred. It will be sufficient to prefer a charge of 'losing by neglect.' 208

The deficiency of the articles which is alleged must be proved by showing that at some previous date the accused was in possession of the articles. A copy of the declaration of the court of inquiry on the illegal absence of the accused would be admitted as evidence. K. 562

The expression 'equipments' includes any article issued to a soldier for his use or entrusted to his care for military purposes, such as blankets and barrack furniture when in the personal charge of an individual soldier. A soldier servant could not be tried under this section for making away with his livery, or a mess waiter for losing property belonging to a mess, or a soldier for spending money temporarily entrusted to him.

A man can be tried for making away with a medal, but not for losing it. When a medal is deficient a K. 1759

C.O. inquires into the case and forwards particulars to the War Office, and the soldier is either tried or the medal is replaced either at once or eventually, at the soldier's or the public cost, according to circumstances.

- 188. FALSE STATEMENTS.**—A *false declaration* has refer- S. 25
ence to declarations made by paymasters and others S. 27
in a position of trust, and to declarations signed by
officers on promotion or retirement, but it does not
apply to statements in a summary of evidence or
ordinary official reports or verbal statements.

A statement made by an accused in his defence, R. 60
even if false, is not an offence, unless he makes a
wholly irrelevant false accusation, but the case
must be very special to justify any proceedings
against an accused on account of his defence.

A soldier stating a falsehood to a superior which
does not come within the exact terms of S. 27 would
be summarily punished or charged under S. 40.

- 189. CONTEMPT OF COURT.**—It is the duty of the presi- R. 59
dent to keep order in the court, to check the use of
insulting and threatening language (whether spoken
or written), and to put a stop to any interruption
or disturbance.

A person guilty of any contempt of court should
be warned of the punishment which may be inflicted
for that offence.

In ordinary cases, an interruption to the proceed-
ings will be best dealt with by accepting an apology
or by ordering the offender (if a civilian) to be turned
out of the court.

Of officer or soldier.—When a contempt of court is S. 28
committed by a person *subject to military law*, he can
be taken into military custody, and can be tried by
another court for contempt.

When the court is insulted or its proceedings dis-
turbed, it may summarily award by order, under the
hand of the president, imprisonment or (in the case

of a soldier) detention for a period not exceeding twenty-one days.

Of civilian.—When contempt of court is committed by a person not subject to military law, the offender should be excluded from the court, and the offence S. 126 may be reported under the hand of the president to the High Court of Justice in England, or Ireland, or to the Court of Session in Scotland.

No more force than is actually necessary should be used in removing the offender from the court, and if he is guilty of any disturbance outside a policeman should be sent for to remove him.

Of accused.—An accused who, when being tried by court-martial, is guilty of contempt of court, and whom it is not thought expedient to try for that contempt before another court, may be summarily punished by order under the hand of the president.

The award must immediately follow the contempt, and the following course will be pursued.

The court, after the president signs the order for the detention, may adjourn until the date at which such punishment expires, and then resume the trial; or if this course (having regard to the attendance of witnesses) is inconvenient, they may conclude the proceedings (except the sentence), make the award for contempt, and then adjourn, re-assembling for the purpose of considering their sentence for the offence under trial.

To summarily punish for contempt of court a person who is under trial, though legal, requires very exceptional circumstances to justify it, and it must be remembered that even though he interrupts the proceedings the trial cannot proceed in his absence.

Of counsel.—Counsel are liable to be punished by S. 129 a civil court for contempt of a military court to the same extent as if they committed the offence in one of the High Courts of Justice.

The president may, by an order in writing, order a counsel to be removed from the court but must

certify the offence committed to a High Court or Court of Session. The removal of a counsel from the court could only be justified under very grave circumstances.

The term *contempt of court* is sometimes used in a wider sense than above referred to, and includes the offences of witnesses in relation to courts-martial. S. 126 228

190. FALSE EVIDENCE.—A person commits the offence of *perjury* who, when duly sworn and examined as a witness in a judicial proceeding, asserts some fact or condition of things material to the issue which he does not at the time believe to be true, or as to the truth of which he knows he is ignorant. S. 29 M. vii 72

The section in the Army Act has, however, a wider application, inasmuch as the false statement may be made in *any proceeding* before a court-martial, or a court of inquiry, or the commanding officer, and it is not necessary to show, upon a charge framed in the words of the section, that it is material to the issue.

The production of the proceedings of the court-martial before which the false swearing is alleged to have taken place is not enough to prove that the accused swore as alleged. The member of the court who recorded the proceedings, or some person from personal knowledge must prove this. The evidence of one witness without corroboration in some material respect is not sufficient to prove the falsehood of the matter sworn.

191. CONDUCT TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE.—The offence charged must not be one which can be met by any other specific section. Stress must be laid on the word *military*, and offences of a social character or connected with civilians should not be charged under this section, unless they are of a nature tending to infringe military discipline. S. 40 M. iii 32

It has been decided that a soldier cannot be charged under S. 40 for impertinence to a civilian,

or refusing to refund money borrowed from a civilian or soldier. A non-commissioned officer, however, who took advantage of his military position in borrowing and not refunding money to a soldier might be tried.

A bandsman might be tried under this section with not taking proper care of the instruments in his charge.

A charge of displaying the white flag in the presence of an enemy where the evidence is not sufficient to justify a charge under S. 4 or S. 5 is to be framed under this section ; as also a charge of improperly possessing a comrade's property, where there is no evidence of theft. K. 555

Attempts to commit offences specified in the Army Act should, unless specially provided for, be charged under this section.

192. CIVIL OFFENCES.—By S. 41 offences punishable by the law of England, if committed by persons subject to military law, are, with certain limitations as to the place of trial in the case of the five most serious offences, triable by court-martial, and can be punished to the same extent as such offences would be punished by a civil court. A military court must not, however, exceed the powers given to it by the Army Act. S. 41 59 M. iii 34 M. vii 2

There are many minor civil offences which would be ordinarily dealt with by court-martial, such as an assault on a civilian, or injury to private property. Many of these petty offences are undoubtedly 'to the prejudice of good order and military discipline,' and would be liable to trial accordingly. An offence charged under S. 41 cannot be tried by a regimental court-martial without the permission of a superior officer. K. 487 K. 548

When offences against civil law are tried by court-martial under S. 41, although technical terms need not be used in the charge, the essence of the civil offence must be expressed, *e.g.*, in a case of damaging

property the charge must aver the damage to have R. 11 been done 'wilfully' or 'maliciously.'

Offences against the ordinary criminal code of the K. Ap. country should be notified to the local police, in viii order that they may be investigated and punished by the civil criminal tribunals.

In cases of murder where the accused and deceased were both subject to the Army Act, the magistrates should transmit a copy of the depositions to the War Office, in order that the Secretary of State may decide whether it is expedient to take steps for a speedy trial under the Homicide Act of 1862.

CHAPTER XXII

PUNISHMENTS

193. PUNISHMENTS—Peremptory Punishments—Civil Offences—Active Service. 194. SCALE OF PUNISHMENTS—Warrant Officers. 195. EXECUTION OF SENTENCE. 196. PUNISHMENT OF OFFICER. 197. CASHIERING AND DISMISSAL. 198. FORFEITURE OF RANK—Honorary Rank—Medals. 199. REPRIMAND. 200. DEATH. 201. PENAL SERVITUDE. 202. IMPRISONMENT AND DETENTION. 203. DISCHARGE. 204. REDUCTION. 205. FORFEITURES. 206. FORFEITURE ON CONVICTION—Forfeiture of Pay. 207. FINES. 208. STOPPAGES—As to Kit—As to Property—As to Moneys. 209. PENAL STOPPAGES—Of Officer—Of Soldier. 210. FIELD PUNISHMENT. 211. COMBINING PUNISHMENTS. 212. COMMUTING PUNISHMENTS.

193. PUNISHMENTS.—Under the old law the expression used in reference to the punishment of an offence was ‘such punishment as a general or other court-martial may award.’ The Act now assigns a maximum punishment to each offence, which need only be given when the offence is of the worst type or when an example must be made.

The punishments in order of severity are placed in a scale, and where in respect of any offence a particular punishment is specified a court-martial may award another punishment lower in the scale, due regard being had to the nature and degree of the offence.

Peremptory punishments.—The two exceptions from M. iii the above rule are the offence of behaving in a scan- 35 dalous manner unbecoming the character of an S. 16 officer and a gentleman, in which case the only pun- S. 41 ishment is cashiering; and the civil offence of murder, in which case death is the only punishment.

Civil offences.—The civil offence of murder may be 59 punished by death, of treason by death or less pun- S. 41 ishment, of manslaughter, treason-felony, or rape, by penal servitude or less punishment, subject to the restrictions laid down in S. 41.

All other civil offences may be punished by imprisonment or the punishment which under the civil law may be awarded for the offence. In dealing with civil offences a military court must not exceed its powers as laid down in the scale.

Active service.—When a soldier on active service is S. 44 guilty of any offence any court-martial may award for M. 721 that offence field punishment for a period not exceed- K. 494 ing three months. In addition to or without any 210 other punishment a court-martial may order an offender to forfeit all ordinary pay for a period commencing on the day of the sentence, and not exceeding three months. In awarding forfeiture of pay conjointly with another punishment such as detention or field punishment allowance must be made for the fact that each day of these punishments in itself entails the forfeiture of a day's pay.

A soldier on active service beyond the seas who has been sentenced by court-martial to penal servitude or imprisonment may have the award temporarily suspended by a prescribed authority, in order to give him an opportunity of earning a remission of his punishment by gallant conduct in the field. (Suspension of Sentences Act, 1915).

194. SCALE OF PUNISHMENTS.—The following table shows both the scale of punishments and the maximum powers of the several courts.

SCALE OF PUNISHMENT.

Sec.	Officers	Court by which tried
44	<i>a.</i> Death. <i>b.</i> Penal servitude, not less than 3 years. <i>c.</i> Imprisonment, with or without hard labour, for 2 years. <i>d.</i> C cashiering. <i>e.</i> Dismissal from H.M.'s service. <i>f.</i> Forfeiture of seniority of rank. <i>g.</i> ¹ Reprimand or severe reprimand.	General court-martial.

	Soldiers	Court by which tried	
48	<i>a.</i> Death. <i>b.</i> Penal servitude, not less than 3 years.		
44	<i>c.</i> Imprisonment, with or without hard labour, for 2 years. <i>d.</i> Detention for 2 years. <i>e.</i> Discharge with ignominy. <i>f.</i> Forfeitures.		General court-martial.
47	<i>g.</i> Detention for 42 days. <i>h.</i> ² Forfeiture of seniority of rank of N.C. officer or reduction to lower grade or ranks	Regimental court-martial.	District court-martial.
181	<i>k.</i> ³ Fines, stoppages.		
183	<i>l.</i> ⁴ Dismissal of a Territorial. <i>m.</i> ⁵ Dismissal or reduction to lower grade of pay of schoolmaster.		

¹ An officer may also be sentenced to forfeit medals and decorations, and to pay compensation for damage occasioned by commission of his offence. P.W. 637. S. 137.

² A non-commissioned officer above the rank of corporal is not to be tried by a regimental court-martial (except on board H.M.'s ships), unless authorised by G.O. commanding district.

³ Under the Royal Warrant forfeitures can only be awarded by general and district courts-martial.

⁴ A C.O. has power to award dismissal as a punishment.

⁵ An army schoolmaster cannot be reduced to the ranks unless he has been transferred from the ranks.

K. 438

T.R. 216

Warrant Officers.—A warrant officer holding an S. 190 honorary commission ranks as an officer and is punished as such.

A warrant officer (not holding an honorary commission) cannot be tried by a regimental court-martial, and if tried by a district court-martial (with a president not under the rank of captain) can only be awarded the following punishments :—

Sec.	Person tried	Punishment	Court of trial
S. 182	Warrant officer	1. Dismissal. 2. Reduction to a lower class or place on the list of his rank. 3. Reduction to a lower grade, or to the ranks (if originally enlisted as a soldier).* 4. Forfeitures, fines, stoppages.	District court-martial.

195. EXECUTION OF A SENTENCE.—A court-martial has nothing to do with the details of carrying out a punishment.

It is the duty of the confirming officer to see that M. v a sentence is carried into effect, and he will obtain, 100 when required, the approval of the civil authorities, and in all cases will give the necessary directions for the execution of the sentence. Abroad, a provost- S. 74 marshal may be ordered to carry out a punishment.

196. PUNISHMENT OF OFFICER.—The sentences of 79 death, penal servitude, cashiering, or dismissal passed on an officer must, if tried in India, be confirmed by the Commander-in-Chief in India, and if elsewhere by the King.

An officer shall be sentenced to be cashiered before S. 44 he is sentenced to penal servitude or imprisonment.

* Any one of the first three of the above punishments may be combined with the last. A general court-martial has power to award the above punishments either in addition to or in substitution for other punishments.

197. CASHIERING AND DISMISSAL.—The distinction between cashiering and dismissal of an officer has never been clearly defined. It is generally held that cashiering is a bar to an officer serving under the Crown again in any capacity, while dismissal does not carry with it any further penalty.

198. FORFEITURE OF RANK.—An officer can be sentenced to forfeiture of seniority of rank, either in the army or in his regiment, or in both, by altering the date of his appointment to the rank held by him, but he cannot be reduced from one rank to another. R. 47

Honorary rank.—An officer who has retired from the service with honorary rank is liable to have that rank cancelled by an order in the *Gazette* if he misconducts himself.

Medals.—In addition to or without any other punishment, an officer may be sentenced to forfeit any medal or decoration in his possession except the Victoria Cross, or an order, such as the Bath or the Michael and George, of which His Majesty is the donor, or a medal or decoration conferred by a foreign Power. 124
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199. REPRIMAND.—Reprimands vary from a public and severe reprimand to a private reprimand. A public reprimand may be administered at the head of a battalion, regiment, brigade, or division, paraded for the purpose; or it may be published in the orders of those commands. Private reprimands are usually given by the commanding officer of a battalion, regiment or brigade at his quarters, in the presence of officers of the regiment, or of officers of equal and superior rank only, or simply in the presence of a staff officer. S. 44

The manner and time of delivering the reprimand is fixed by the confirming authority.

200. DEATH.—A prisoner would be sentenced to be either hanged or shot, according to whether it was a civil

or military offence which had rendered him liable to the penalty of death.

A sentence of death can only be passed by a S. 48 general, or field-general court-martial, and then only S. 49 with the concurrence of two-thirds of its members in the case of a general court-martial, and by a unanimous vote in the case of the latter court.

An officer who confirms a sentence is responsible 145 for seeing it carried into effect, and after obtaining the special approval, generally necessary in cases of death, will give directions for the execution.

- 201. PENAL SERVITUDE.**—When a person has been S. 58 sentenced to penal servitude, he is committed with- 62 out delay by the proper authority to a penal servi- K. 602 tude prison, and comes under the power of the 145 Home Secretary.

A person sentenced abroad to penal servitude is S. 131 sent to a prison in the United Kingdom, unless he belongs to a class with respect to which a Secretary of State has declared that such a transfer is not beneficial by reason of birth, climate, or the place of his enlistment.

All sentences of penal servitude commence from 128 the day on which the president signs the original S. 68 proceedings.

- 202. IMPRISONMENT AND DETENTION.**—The im- S. 68 prisonment or detention inflicted under one or more sentences must never exceed two years, and commences on the day on which the original proceedings are signed by the president.

When a court-martial passes sentence on a soldier K. 584 already under sentence of imprisonment or detention, or on a soldier tried at the expiration of a term of imprisonment or detention for an offence committed or discovered during its continuance, any period passed in military custody or imprisonment by the civil power between two periods of imprison-

ment, or of detention, or between a period of imprisonment and a period of detention, or *vice versa* is to be reckoned as part of the term. But where there is even a single day's actual freedom, whether by release or escape, the continuity is broken.

Terms of imprisonment or detention not amount- K. 585
ing to six months will be awarded in days, and terms of imprisonment of one year and two years in years. All other terms of imprisonment or detention will be awarded in months, or, if required, in months and days.

The word month in a sentence of imprisonment or detention means, unless the contrary is expressed, a calendar month, and a year means twelve calendar months.

In calculating the date on which sentences expire K. 644
the rule will be apparent from the following exam- 129
ples, viz. :—

(a) A sentence of eight months' imprisonment or detention awarded on September 30 expires on the following May 29. If awarded on October 1 it expires on May 31.

(b) A sentence of nine months' imprisonment or detention awarded on May 29, 30, 31, expires on the last day of the following February.

A soldier sentenced to imprisonment for offences K. 607
under Secs. 17 and 18 (4) (5) of the Army Act, or for any offences under S. 41, or who has been sentenced to be discharged with ignominy (except for a purely military offence), will be committed to a public (civil) prison. A soldier sentenced to imprisonment for a purely military offence will be committed to a military prison.

A soldier sentenced to detention will be committed to a detention barrack; but if the term of detention to be undergone does not exceed 168 hours, and he cannot be received in a detention barrack, the punishment may be carried out in duly-certified barrack detention rooms.

In the case of a unit or draft being ordered abroad, S. 67 arrangements will be made for the embarkation of K. 622 soldiers who are in detention barracks and whose removal has been approved, but such prisoners cannot be recommitted to a prison or detention barrack S. 63 abroad.

Soldiers under sentence whose removal is ap- K. 623 proved, are usually released on embarkation, and if this is not done, on disembarkation.

When troops move from one station to another K. 163 either at home or abroad the soldiers under sentence confined in detention rooms are to be taken with their units and recommitted to the detention rooms at the new station.

Soldiers sentenced to imprisonment or detention K. 609 abroad will not be committed to or retained in a S. 65 civil prison if there is room in a detention barrack.

A soldier sentenced to more than twelve months' S. 131 imprisonment or detention in India or in a colony is sent to a prison or detention barrack in the United Kingdom, unless he belongs to a class with respect to which a Secretary of State has declared that such a transfer is not beneficial.

When a regiment abroad moves from colony to R. 130 colony it can take its soldiers under sentence with it, but they can only be recommitted to a military prison or detention barrack or authorised prison.

When a corps is removed from abroad to the K. 627 United Kingdom, its soldiers under sentence will S. 66 accompany it to its destination, and will be recommitted to some prison or detention barrack.

When a soldier is released from imprisonment or K. 636 detention at any hour he will be confined to barracks and be exempted from duty on that day.

A sentence of imprisonment or detention is not S. 158 affected by the offender being discharged or dismissed or otherwise ceasing to be subject to military law, *e.g.*, a special reservist sentenced to imprisonment or detention during training can be kept in prison

for the whole term of his sentence, although the period of training expires before the completion of the sentence.

- 203. DISCHARGE.**—Soldiers sentenced to penal servitude and imprisonment may in addition be sentenced to be discharged with ignominy, and should be so sentenced in the case of persistent offenders, and for offences of a disgraceful nature and for an offence under S. 32. Prisoners sentenced abroad to discharge with ignominy will be sent to the United Kingdom so as to arrive before the expiration of their imprisonment. S. 44 175 K. 612

Whether sentenced to discharge or not, all soldiers who have undergone penal servitude are to be discharged, and not allowed to rejoin the service. K. 392

- 204. REDUCTION.**—A non-commissioned officer may, by the sentence of a court-martial, be ordered to forfeit seniority of rank, or be reduced to any lower grade or to the ranks, either in addition to or without any other punishment, but a regimental court-martial should not deal with non-commissioned officers above the rank of corporal. S. 183 R. 47 K. 438

Regimental courts-martial for the trial of *any* non-commissioned officers can, however, be held on board H.M.'s ships, but their power of punishment is restricted to reduction, fines, and stoppages. M. 728 57 137

Forfeiture of seniority of rank affects the precedence of a non-commissioned officer, but does not deprive him of any previous service in that rank which may qualify him for pension.

A non-commissioned officer should always be sentenced to be reduced to the ranks before a sentence of penal servitude, imprisonment, detention or field punishment is passed, although these sentences necessarily involve a reduction to the ranks.

Care must be taken in wording a sentence of reduction when the prisoner holds acting rank or an appointment. A non-commissioned officer can only be reduced to or from a permanent rank. Thus a

- . lance-sergeant could not be sentenced to be reduced to a corporal, nor could a lance-corporal be reduced to the ranks.

When a prisoner holds acting rank it should be noticed in the charge sheet, but no reference to it should be made in awarding the sentence. **213**

Any non-commissioned officer may be reduced to a lower grade or to the ranks by the Army Council, the Commander-in-Chief in India, and on active service by an officer commanding in chief in the field and any general officer he may appoint.

- 205. FORFEITURES.**—A soldier may, in addition to or without any other punishment, be sentenced by a general or district court-martial to forfeit— **S. 44**

1. All or any of his past service towards pension. **P.W.**
2. All or any deferred pay already earned. **1138**
3. All or any of his good-conduct badges. **1114**
4. Any medal or decoration (other than the Victoria Cross), or military reward, and where a medal or decoration is ordered to be forfeited, such sentence shall entail the forfeiture of any medal or decoration appertaining to it. **1095 1238**

But none of the above forfeitures shall be awarded if the conviction or the sentence of the court is such as to entail such forfeitures, nor shall such forfeiture extend to any sum of money which has already been paid.

Where a soldier signs a confession that he has been guilty of desertion or fraudulent enlistment, a competent authority may, by order, dispense with his trial, and award the same forfeiture and deductions from pay as a court-martial could award for the offence, or as are consequential upon conviction of the offence, except such of them as may be mentioned in the order. **S. 73 173**

- 206. FORFEITURE ON CONVICTION.**—Certain forfeitures necessarily result from conviction of an offence or sentence of a court or discharge as a bad character. **167**

A soldier who is found guilty of desertion or fraudulent enlistment, or who confesses guilt of desertion or fraudulent enlistment and (being liable to trial) has his trial dispensed with, or who has fraudulently enlisted, but whose trial is barred by reason of his having served in an exemplary manner for three years, *forfeits all service* prior to such conviction, dispensing order, or fraudulent enlistment, and has to serve for the term of his original enlistment, or, if re-engaged, for the term of his re-engagement, reckoned from the date of such conviction, dispensing order, or enlistment.

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Any general or district court-martial may sentence an offender to forfeit the whole or any portion of his *past qualifying service*.

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A soldier who is discharged from the army with ignominy, or as a worthless character, or on account of misconduct, or on conviction by the civil power, or on being sentenced to penal servitude, or for giving a false answer on attestation, *forfeits all qualifying service* prior to such discharge.

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When service is forfeited in the above-mentioned cases, all pension, deferred pay, and good-conduct badges earned by such service are forfeited, as well as all medals* and decorations (other than the Victoria Cross), together with the annuities and gratuities belonging to them (unless remitted by an order dispensing with trial).

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A soldier who has been convicted of an offence of a felonious or disgraceful character (S. 17 or 18), whether by court-martial or civil court, or who has for *any* offence been sentenced by a civil court to imprisonment exceeding six months, *forfeits all* medals and decorations (other than the Victoria Cross), together with the annuities and gratuities belonging to them.

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* Medals may be restored under certain conditions. Deferred pay and G.C. pay are in process of extinction.

A soldier who has been sentenced by court-martial P.W. or civil court to imprisonment exceeding six months, 1096 or who has been convicted of an offence under S. 18 1097 of the Army Act, and a soldier who has improperly enlisted while belonging to the Army Reserve, and who on detection has been re-transferred to the reserve, forfeits all good-conduct badges.

Forfeiture of pay.—A soldier shall forfeit his pay S. 138 (a) for every day of absence on desertion or without P.W. leave ; (b) for every day of imprisonment, detention 977 or field punishment ; (c) for every day of confinement on a charge of which he is afterwards convicted by a civil court or court-martial, or on a charge of absence without leave for which he is afterwards awarded detention by his commanding officer, or in consequence of his having confessed to having been guilty of desertion or fraudulent enlistment, if forfeiture is ordered by competent authority ; (d) for every day in hospital on account of sickness certified to have been caused by an offence under the Army Act committed by him, and of which he has been found guilty ; (e) *on active service* for every day for which forfeiture of pay has been awarded as a punishment.

A commanding officer has no longer the power of 43 depriving a soldier of his pay for short absence. A soldier enters into a contract with the Government to do certain work, and if he absents himself from his duties his pay is necessarily forfeited by royal warrant.

207. FINES.—In addition to or in substitution for other S. 19 punishments, a soldier can be sentenced to a fine not exceeding 1*l.* for drunkenness.

Courts-martial are in certain cases called on to S. 41 administer the ordinary criminal law of England, and can in such cases fine up to the limits of that law, and the fine should be ordered to be paid to His Majesty.

208. STOPPAGES are intended, not for punishment, but S. 138

to compensate for loss sustained. When the award K. 565 of the court more than covers the actual loss or damage, the matter will be adjusted by the officer who has to make the deduction of pay.

In case of damage caused by an offence, the cause and effect must be closely related, in order to warrant a sentence of stoppages. Thus a soldier escaping from custody would not for this purpose be said to have caused damage to a military policeman's clothes because the policeman fell down and damaged them while in pursuit of him.

As to kit.—When a soldier is charged with making 216 away with or losing clothing or necessaries, the value of the articles are stated in the charge if they belong to Government, and the value has to be made good to the public—such as great-coats, shako, etc. If, however, the articles are the property of the soldier, K. 563 which he has to keep complete in number and in good order at his own expense, the value is not stated in the charge.

When the value of articles is not stated in the charge, no stoppages shall be awarded in respect of them in the sentence.

The court punishes the soldier for losing the articles in question, but need not enter into the question of replacing them, as they have to be made good by him by arrangement with his captain.

As to property.—When several men are convicted of collectively destroying public property they may each be sentenced to pay the full amount of damage, and the total loss will be properly divided among those from whom the money can be recovered.

Where an accused has been sentenced to stoppages 138 in respect of stolen property, and money found upon him has been restored to its lawful owner, he should K. 586 be placed under deductions for the balance only of the stoppage awarded.

As to moneys.—When a soldier is accused of misappropriating public or other moneys in his charge, the

stoppage inflicted should be limited to such a sum as might reasonably have been left in his keeping. Pay-sergeants of squadrons, troops, batteries or companies are not to be entrusted with more money than is absolutely necessary to carry on their duties. To take charge of public money is the duty of the officer commanding these units, and he is responsible that due supervision and proper checks are used. K. 112

209. PENAL STOPPAGES.—Penal deductions can only 45
be made from the *ordinary* pay of an officer or soldier or from any sums due to him. Deductions may be S. 140
made from any prize money or good conduct pay or deferred pay which has been earned but not paid over, but money in the savings bank cannot be touched.

Of Officer.—A court-martial which has convicted S. 137
an officer of an offence may sentence him to make good any loss or damage caused by the commission of that offence. An officer may also be required to pay for loss or damage to public property, occasioned by a wrongful act or negligence and to make good the pay of any officer or soldier that he has unlawfully withheld, and he may be deprived of his ordinary pay for any period during which he is absent without leave.

Of Soldier.—A soldier is deprived of his pay for S. 138
every day of absence from duty arising from his own 206
fault. His pay may be stopped, to make good such compensation for loss or damage as may be awarded by a court-martial, order for dispensing with trial, commanding officer, or a captain of one of His Majesty's ships; to pay a fine awarded by a court-martial, commanding officer, or civil court; and to contribute any sum ordered by the Army Council to the maintenance or cost of relief of his wife and children.

The amount of pay stopped must, after allowing for the expenses of messing and washing, leave the soldier not less than 1d. to spend.

The pay, non-effective pay, and all other emoluments P.W. 8
granted to an officer or soldier may be stopped by

order of the Army Council to meet public claims or regimental debts.

- 210. FIELD PUNISHMENT.**—Where a soldier on active S. 44 service is guilty of any offence a court-martial may M. iii award field punishment for a period not exceeding 37 three months.

In addition to or without any other punishment a court-martial may also order that the offender forfeit ordinary pay for a period not exceeding three months. The forfeiture will only take effect on the balance of the soldier's pay which remains after providing for any other penal deductions to which he may be liable.

In making a conjoint award of forfeiture of pay and field punishment allowance must be made for the fact that a soldier who is awarded field punishment necessarily forfeits his pay while undergoing that punishment. S. 138

Field punishment is of two kinds—field punishment No. 1, and field punishment No. 2. M. 721

An offender sentenced to field imprisonment No. 1 may be fettered by means of irons, straps, or ropes, so as to prevent his escape. While so secured he may be attached for a period or periods to a fixed object, but he must not be so attached for more than two hours in a day, or for more than three days out of four, or for more than twenty-one days in all. The above punishment may be awarded beyond the seas, but not in the United Kingdom.

Field imprisonment No. 2 refers simply to the fettering of a man by means of irons, straps, or ropes, and does not include attachment to a fixed object.

In both cases an offender may be subjected to any hard labour, employment, or restraint to the same extent as if he had been sentenced to imprisonment with hard labour.

Field punishment must not be inflicted so as to

cause injury or leave a permanent mark on the offender.

All offenders awarded field punishment shall march with their unit, carry their arms and accoutrements, perform all their military duties as well as extra fatigue duties and be treated as defaulters. While troops are actually on the move the offenders are exempt from being tied up to a fixed object.

- 211. COMBINING PUNISHMENTS.**—As a rule one of S. 44 the punishments in the scale is awarded, but in the following cases punishment may be combined :—

An officer shall be sentenced to be cashiered before he is sentenced to penal servitude or imprisonment.

An officer sentenced to forfeiture of seniority of rank may in addition be sentenced to be reprimanded.

A soldier sentenced to penal servitude or imprisonment may in addition be sentenced to be discharged with ignominy.

A non-commissioned officer may be ordered to S. 183 forfeit seniority of rank or to be reduced to a lower grade or to the ranks, in addition to any other punishment.

In addition to other punishments an offender may **205** be sentenced to any authorised deduction from pay, or to forfeit the whole or any portion of his service towards pension, or his deferred pay, or good-conduct badges or medals or decorations, together with any annuities and gratuities appertaining thereto.

In combining punishments regard must be paid to the nature and degree of the offence. Discharge with ignominy would only be awarded when the further services of the soldier are deemed undesirable. Forfeitures would not be combined with discharge with ignominy, nor would a fine be awarded except for the offence of drunkenness.

- 212. COMMUTATION OF PUNISHMENTS.**—Any pun- S. 44
ishment can be commuted to any less punishment or S. 57

punishments lower down in the scale to which an offender might have been sentenced by the same court. For example, death may be commuted to penal servitude or imprisonment, penal servitude to imprisonment, imprisonment to detention, cashiering to dismissal, etc. Imprisonment can, however, only be commuted to an equal or shorter term of detention, and the sentence of cashiering an officer for scandalous conduct cannot be commuted or altered to any other punishment. In such a case where a less penalty is deemed to be sufficient, the Crown would grant a pardon conditional on the officer undergoing the lighter sentence. S. 16 138

Partial commutation of any one punishment by the substitution of a portion thereof of another punishment is illegal.

A soldier guilty of desertion or fraudulent enlistment (and not exempted by S. 161), and a soldier sentenced by a court-martial to a punishment not less than detention for three months, may have his punishment commuted wholly or partly to general service by a competent military authority. S. 161 S. 83 K. 597

The above provision enables a man to be sent to serve abroad or in some other sphere, where, by reason of more work, less temptation, or otherwise, he may have a chance of turning over a new leaf and obtaining a fresh start in life. M. x 11

For the purpose of commutation *field punishment* ranks next below detention in the scale of punishments. S. 44

CHAPTER XXIII

CHARGES

213. CHARGE SHEET—Description of Accused. 214. CHARGE—Statement—Particulars. 215. PERSON MAKING THE CHARGE.—216. FRAMING CHARGES—Distinct Offences—Time of Offence—Place of Offence—Loss or Damage—Words Used—Unnecessary Particulars. 217. SEVERAL CHARGES. 218. DEFECTIVE CHARGES. 219. ALTERNATIVE CHARGES. 220. JOINT CHARGES. 221. ALTERING CHARGES. 222. SEPARATE CHARGE SHEETS. 223. USE OF SEPARATE CHARGE SHEETS.

213. CHARGE SHEET.—When an accused is to be tried R. 9 by court-martial a *charge sheet*, which may contain R. 10 one charge or several charges, is laid before it.

Every charge sheet will begin with the name and description of the person charged, and should state, in the case of an officer, his rank, name, and corps (if any); and in the case of a soldier, his number, rank, name, and corps (if any).

Description of accused.—In describing an accused it is immaterial whether he is charged by his real name or an alias so long as his identity is established. A soldier would usually be charged under the name in which he was attested and was commonly known in his regiment.

It is always necessary to show that the person charged is subject to military law. In the case of the regular forces a statement that the accused belongs to a unit of the regular army is sufficient, though it is usual to add the words ‘a soldier of the regular forces.’

If the accused belong to the territorial forces, or M. 649
to the reserves, the description must show that he was
at the time of the offence subject to military law,
e.g. 'an officer of the special reserve of officers';
'a soldier of the territorial force out for training.'

The particulars of the charge must also show that M. 676
any 'superior officer,' 'soldier' or 'comrade'
referred to therein was also subject to military law.

In the case of a civilian (as may happen on active
service) it will be necessary to expressly aver that
he was 'subject to military law as a soldier (or
officer). . . .'

A mistake as to the name and description of the R. 33
person charged does not invalidate the charge sheet, R. 12
so long as he does not object, and it is not shown
that injustice is done him. The court, however,
may always at any time during the trial amend the
charge sheet, so as to correct the mistake, provided
that it is clear that the accused is the person intended
to be charged, and that he is not prejudiced in his
defence by the mistake having been made.

Non-commissioned officers should be arraigned in 129
their army rank, and if they hold acting rank it
should be mentioned in a bracket. Thus, 'the
accused No. 42, Corporal (Lance-Sergeant) A,' etc.

The charge sheet should be signed by the C.O. of
the accused. If a soldier has elected to be tried
instead of submitting to a summary award, it should
be so stated (in red ink) at the top of the charge
sheet.

214. CHARGE.—A charge means an accusation that R. 9
a person amenable to military law has been guilty of
an offence.

Each charge should state one offence only and
should be divided into two parts :— R. 11

1. *The statement of the offence*, which should be in
the words of the Army Act.

When offences against civil law are tried, though S. 41
technical terms need not be used, the essence of
the civil offence must be expressed, *e.g.* in the case

of damaging property the charge must aver the damage to have been done 'wilfully' or 'maliciously.'

2. The *particulars*, which should be sufficiently explicit as to names, dates, and circumstances as to leave no doubt in the mind of the accused as to what offence he is charged with.

- 215. PERSON MAKING THE CHARGE.**—The charges against a soldier are, in the first instance, framed by the adjutant or some other officer and the charge sheet must be signed by the officer in command of the unit to which the accused belongs.

If a soldier has elected to be tried instead of submitting to a summary award the charge framed must be substantially the same as that read out to the accused from the guard-report. K. 487A

Before proceeding with a case it is the duty of the commanding officer to ascertain that the soldier is liable to trial (in respect of lapse of time). Except when it is important that the guilt or innocence of the accused should be definitely decided, it is undesirable to send a case before a court-martial when it appears doubtful if the evidence will lead to a conviction. K. 489

When a commanding officer does not himself assemble a regimental court-martial he forwards a copy of the charges to the convening officer, together with his application for a higher court.

The convening officer who issues the order for trial must satisfy himself that the charge is properly framed and discloses an offence under the Army Act, and that the evidence is sufficient to justify the trial of the accused. K. 567 R. 17

Before convening a general court-martial in the United Kingdom the charge-sheet, summary of evidence, and detailed list of officers to serve on the court, together with the name of the officer recommended for judge-advocate, should be submitted to the judge-advocate general. M. 705

- 216. FRAMING CHARGES.**—The procedure as to charg-

ing an accused differs materially in civil and military courts.

A civil court can only try a man for offences arising out of a single transaction, while a military court can deal at the same time with several charges referring to totally distinct offences.

Courts-martial are not bound by the technicalities of civil courts, but all vagueness in charges should be avoided, and they should be made as simple and direct as possible.

Distinct offences.—Each charge should state *one* R. 11 distinct offence in clear and simple language, alike comprehensible by the court and the accused, without legal assistance to explain terms and technicalities.

A single transaction should not as a rule be made the subject of more than one charge unless there is a doubt as to the precise nature of the offence when alternative charges are used. Thus, a man should not be tried for absence without leave and failing to appear at parade during the time of absence, as the offences alleged are necessarily part of one transaction. Where violence to a superior is accompanied by insubordinate language, the violence alone should be charged, the language being admissible in evidence as to the intent.

In no case should an offence be described in the alternative in the same charge.

A conviction of 1867 of a storekeeper for ‘fraudulently embezzling or misapplying property’ was set aside on this ground.

When a soldier is charged with a serious offence, K. 568 minor irregularities should not be brought forward as additional charges. Thus a man should not be tried for desertion, and also for being improperly dressed when apprehended, as the lesser offence has merged in the graver one.

Time of offence.—The time at which an offence was Ap. 1 committed must be stated with as great accuracy as the evidence in proof admits of. When the time is an essential factor in the charge, as in the case

of a 'sentry sleeping on his post,' it is best to state between the hours of — and —, *i.e.* the time during which the accused was posted as sentry. When the exact date or time is unknown it is sufficient to use the terms 'on or about' the — day of —.

Place of offence.—It is usually sufficient in a charge to give a general description of the place where the offence was committed, such as 'at Aldershot,' or 'on the line of march.' If, however, the exact spot is material to the charge, as, for instance, in the case of a non-commissioned officer leaving his guard, or a sentry leaving his post, the exact guard-room or post should be named.

Loss or damage.—When the accused is charged with any loss or damage, the value is stated in the particulars of the charge. When a loss of money is the subject of trial, the lump sum only need be stated, and there is no necessity for distinguishing between gold, notes, etc.

In the case of articles of kit, the value is only 187
stated in reference to articles of Government pro- 208
perty—the value of which has to be made good to the public, such as a great-coat, helmet, etc. The K. 563
value of regimental necessaries or personal clothing which are issued to a soldier need not be stated, as deficiencies have to be made good by the soldier as a matter of necessity, and his captain debits his account for the same.

Words used.—When an offence consists of words 'used or written,' they should be inserted as accurately as possible. After the actual words it is usual to state 'or words to that effect.'

Unnecessary particulars.—It is undesirable to append to a charge particulars not necessarily bearing on it. Thus, in a case of absence it is unnecessary to state that the man remained absent until he was apprehended, although such a fact may very properly be proved in evidence, and affect the sentence of the court.

217. SEVERAL CHARGES.—In the case of several R. 11 charges the particulars in one charge may refer to the particulars in another. Thus a first charge may specify a distinct time and place, and a second charge merely state 'at the time and place specified in the first charge,' instead of again repeating the date and place.

If, however, the prisoner is acquitted of the charge Ap. 1. in which the particulars are stated, and convicted of the other one, any subsequent record of conviction in regimental or other books must set out in full the particulars omitted.

218. DEFECTIVE CHARGES.—Where there is such a R. 11 divergence between the head of charge and the statement of particulars that each *in substance* discloses a different offence the charge is bad, and a conviction, even on a plea of guilty, could not be upheld. The incidental mention of a separate offence in the particulars would not, however, invalidate a charge, so long as the accused was distinctly informed of the charge he had to meet.

Where the head of charge discloses no offence, but the statement of particulars does and with sufficient precision to inform the accused of his offence, a conviction of the offence disclosed in the particulars was, notwithstanding the irregularity, held good.

A charge may be defective either in heading or in statement of particulars, but it would generally hold good if in the charge as a *whole* the offence was shown to be one under the Army Act, and it was described with sufficient minuteness to enable the accused to know exactly what he had to answer.

219. ALTERNATIVE CHARGES.—When an offence has Ap. 1 been committed the charge should be clear and simple, and not expanded or split up, as is the custom in civil courts. When there is any doubt as to how the offence should be described, or what military offence has been committed, separate alternative

charges can be used. An accused can only be convicted on one of these charges, and is necessarily acquitted of the other. R. 44

If a man was found improperly in possession of the property of others, and it was difficult to prove exactly how it came into his keeping, alternative charges might be preferred (1) of stealing the goods, (2) of receiving them knowing them to have been stolen. S. 18

A man, again, might be charged with using insubordinate language to his superior officer, and there might be a doubt as to whether the language was sufficiently strong to justify the term 'insubordinate.' An alternative charge of 'conduct to the prejudice of good order and military discipline,' in using the words in question, might be necessary. S. 8 S. 40

A soldier whose kit is found to be deficient may be charged with making away with it by pawning it, or selling it, or destroying it, or may be charged with losing it by neglect; but if there is any doubt as to the sufficiency of evidence as to the positive act of pawning, selling, etc., alternative charges may be used of 'making away with' and 'losing by neglect.' S. 24 K. 562

Where alternative charges are preferred, one of which charges a less grave offence than the other, care must be taken that the accused does not escape the punishment applicable to the graver offence by pleading 'guilty' to the minor one. 105

- 220. JOINT CHARGES.**—Any number of accused persons may be tried *together* on one or more charges for offences which have been committed by them collectively. Notice of the intention to try them together must be served on each man, and any of the accused, either before or on arraignment, may claim a separate trial, if the nature of the charge admits of it, on the ground that the evidence of the other persons accused is material to his defence. R. 15 101 131

The committing of an offence *collectively* implies a certain amount of combination or mutual help, and does not refer to the commission of individual offences by men in the company of each other. Thus, a number of men who were drunk together or were absent at the same time would be tried separately; while men might be charged jointly with breaking the windows of a house, or assaulting an escort who had charge of them.

When a conspiracy among several of the accused is the essence of the charge, as in the case of conspiring to cause a mutiny or joining in a mutiny, it is generally essential that they should be jointly arraigned. In cases of doubt the accused should be tried separately.

221. ALTERING CHARGES.—The president of a court-martial (and the judge-advocate if there is one) has an opportunity of seeing the charge sheet before the court assembles, and should inform the convening officer before the trial commences of any amendment he may think necessary. R. 17 R. 103

The prosecutor must also of necessity see the charge sheet before the trial begins, and should report to the convening officer if there be any particulars alleged which, in his opinion, cannot be supported by evidence.

At any time during the trial a mistake in the name or description of the accused may be amended by the court, provided, of course, that the person charged is not thereby prejudiced in his defence by such mistake or alteration. R. 33

Charges can only be materially altered by the convening officer, and corrections must be made before any of the witnesses have given their evidence. R. 33 80

After a trial is commenced, if the court are of opinion that the essence of the charge is proved, but that the particulars as alleged are defective, they may (if injustice is not thereby done to the accused) record a *special finding* amending the particulars in question. R. 44 119

When a charge is found to be bad after the trial has begun, the convening officer will dissolve the court, and, if further action is to be taken, will assemble a new court to try the accused on a fresh charge.

- 222. SEPARATE CHARGE SHEETS.**—The convening officer may direct that the charges against the accused be inserted in separate charge sheets, and when a charge sheet contains more than one charge the accused, when arraigned, may claim to be tried separately in respect of any charge or charges inserted in that charge sheet. If such claim be admitted the court shall, after having been sworn, arraign and try the accused in like manner as if the convening officer had inserted the said charge or charges in different charge sheets. The procedure after the finding shall be the same as if all the offences were contained on one charge sheet. R. 62
93

When the accused is tried on several charge sheets, the convening officer may direct that if he be convicted of one or more of the most serious offences in any charge sheet, he need not be tried on the other charge sheets.

- 223. USE OF SEPARATE CHARGE SHEETS.**—A military court is as a rule ill adapted to deal with cases in which the evidence is complicated. The regulations with regard to separate charge sheets have been introduced in order to aid the court in arriving at a finding and the accused in making his defence. By dealing with each charge separately the evidence can with ease be confined to it, and confusion does not arise by mixing up the evidence necessary to prove one charge with the evidence bearing on the other charges. R. 62

Repeated instances of the same description of offence may be included in the same charge sheet, but offences of different descriptions should be in-

cluded in separate charge sheets, except when they form part of the same wrongful transaction.

To this may be added cases where embarrassment may arise from the facts of any of the charges being very complicated, or when a considerable time has elapsed between the commission of the offences, or when different sets of witnesses are required to prove the different offences.

In cases of repeated desertion or fraudulent enlistment, where it is desired that the higher punishment allowed for a second offence should be awarded, the charges must be on separate sheets. S. 12

CHAPTER XXIV

WITNESSES

224. SUMMONING OF WITNESSES. 225. ISSUE OF SUMMONS—To Soldiers under Sentence—Neglect to Summons a Witness. 226. SERVING OF SUMMONS. 227. EXEMPTION FROM SUMMONS. 228. DISOBEYING A SUMMONS. 229. PRIVILEGE OF WITNESS FROM ARREST. 230. EXPENSES OF WITNESS. 231. COMPETENCY OF WITNESSES—Compellable Witnesses. 232. CREDIBILITY OF WITNESSES. 233. OATH OF WITNESS—Refusal to be Sworn. 234. PROSECUTOR AS WITNESS. 235. MEMBER AS WITNESS. 236. PROSECUTOR'S WITNESSES. 237. WITNESSES OF ACCUSED. 238. WITNESSES IN COURT. 239. EXAMINATION OF WITNESS—Cross-examination—Re-examination. 240. EXAMINATION IN CHIEF—Leading Questions—When Admissible—Refreshing Memory. 241. CROSS-EXAMINATION—Leading Questions—Irrelevant Questions—Degrading Questions—As to Previous Statements—Cross-examination of Accused. 242. QUESTIONING WITNESS—Reply—Correcting Evidence. 243. PRIVILEGE AS TO ANSWERS—Criminating Answers—Degrading Answers—Professional Secrets—Official Secrets—Husband and Wife. 244. CONTRADICTION OF ANSWERS. 245. IMPEACHING CREDIBILITY OF WITNESSES. 246. CONTEMPT OF COURT.

224. SUMMONING OF WITNESSES.—Before the assembling of a court the convening officer, and after its assembly the president, are responsible that all witnesses whose attendance can *reasonably* be secured

S. 125

R. 78

are either summoned or ordered to attend. If a witness whose evidence is essential to the prosecution or defence is from any cause not in attendance the court should adjourn and report the circumstance to the convening officer. R. 79

225. ISSUE OF SUMMONS.—Witnesses, subject to military law, are ordered to attend by the proper military authority, and warned to bring with them any documents or other proofs that are necessary to the trial.

When an officer or soldier is required as a witness before a court-martial and is not serving in the district in which the court is to be held, application for his attendance is to be made to the brigade commander under whom the witness is serving and the probable day of assembly of the court should be stated. When there is any doubt as to who is the proper military authority, application should be made to the War Office. K. 571

Civilian witnesses are summoned to attend by an order under the hand of the convening officer, or the judge-advocate, or the president of the court, or the commanding officer of the accused, according to circumstances. S. 125 R. 78

When documents of any kind which are necessary to the trial are in the possession of a civilian witness a special clause must be inserted in the summons calling on him to produce them. M. 699

A person present in court may be called on to give evidence as a witness without any previous notice or formality.

To soldiers under sentence.—When a soldier under sentence is required as a witness, the officer commanding the military district where the prison or detention barrack is situated or other prescribed officer gives the order for removal. In the United Kingdom S. 63 64 K. 621

application will be made to the War Office for the removal of a soldier under the sentence of a civil court.

Neglect to summon a witness.—If proper steps have not been taken to procure the attendance of a witness whom the prosecutor or the accused desires to call, or if any witness whose attendance could not *reasonably* be procured before the assembly of the court is essential to the prosecution or defence, the court should adjourn and report the circumstances to the convening officer. R. 79

226. SERVING OF SUMMONS.—A summons must be served personally and in reasonable time before the trial by some one in authority, such as a non-commissioned officer or a policeman. If the witness required be a married woman it is not sufficient to give the summons to her husband. Summonses should be prepared in duplicate, and one retained by the server, who should note on it the place and date of serving the other.

227. EXEMPTION FROM SUMMONS.—No person can claim to be exempt from the regularly issued summons of a civil or military court, except the King. Officials in high positions would, however, be justified in refusing to be examined on matters which it would be contrary to the public policy to disclose. Causing persons in high official position to be summoned before a court-martial without reasonable excuse could be dealt with as a military offence. M. vi 96
S. 40

228. DISOBEYING A SUMMONS.—A witness subject to military law who does not obey a summons or order to attend can be tried either for disobedience of orders or contempt of court, according to circumstances. S. 9
S. 28

A civilian witness who has been *tendered his reasonable expenses* and does not attend to a summons can be tried by a civil court of law for contempt of court. 230

The court-martial should take evidence on oath R. 78 as to the service of the summons and the tender of expenses. The president should then forward a certificate through the convening officer to the S. 126 Army Council reciting the facts and attaching a certified extract from the proceedings. No further action can be taken without instructions from headquarters.

229. PRIVILEGE OF WITNESS FROM ARREST.—A S. 125

witness, whether civil or military, who has been summoned to attend as a witness before a court-martial is, during his necessary attendance on such court, and while going to or returning from it, privileged from arrest to the same extent as if it were a superior court of civil jurisdiction—*i.e.* from arrest on civil process for debt, damage, trespass etc., but not from arrest on a criminal charge.

230. EXPENSES OF A WITNESS.—In order to prevent R. 78 an *unreasonable* demand as to the procuring of witnesses, the person requiring them may be called M. v 68 on to defray the cost of attendance.

Travelling expenses are usually granted to witnesses attending courts-martial or courts of inquiry held solely on the public service. The claims of civilian witnesses should be certified by the president as just and reasonable. A personal allowance suitable to the claimant's station in life may also be given, and at stations abroad the established practice of the civil courts should be made the basis of settlement. (Army Allowance Regulations.)

When officers or soldiers are defendants in cases tried before civil tribunals, they will provide for the attendance, without cost to the public, of any military or other witnesses they may call for their defence.

231. COMPETENCY OF WITNESSES.—Formerly persons were disqualified from giving evidence owing to crime, or interest, or being parties to the proceedings, but these disqualifications have been removed by statute, and every person is competent to give evidence as a witness before a court-martial, with the following exceptions. M. vi 82

1. *The accused or any accused being tried jointly with him cannot be called as a witness for the prosecution.* M. vi 83

By the Criminal Evidence Act of 1898 a person charged is a competent witness, but (1) he can only give evidence for the defence, and (2) he can only give evidence if he himself applies to do so. R. 80

If the prosecution require the evidence of an accused who is jointly arraigned with other accused persons, he should be released or a separate verdict of 'not guilty' taken against him. An accused person so giving evidence is popularly said to turn King's evidence. M. vi 84

Though an accused who is being tried together with other persons is a competent witness for the defence, none of the other persons accused can compel him to give evidence. R. 15

If, therefore, an accused thinks that the evidence of one or more of the other persons proposed to be conjointly arraigned will be material to his defence, he should claim a separate trial.

2. *The wife of an accused or of any accused tried jointly with him cannot be called as a witness for the prosecution.*

Husband and wife are not competent to give any evidence tending directly or indirectly to criminate each other, except in those cases where violence or bodily injury inflicted by one or the other is the offence charged, or where the husband or wife prosecutes the other for some offence relating to property, and in a few other cases. M. vi 86
S. 156

The wife of a person charged is a competent witness, but (1) she can only give evidence for the defence (except in the above special cases), and (2) she can only give evidence if her husband applies that she should do so.

Husband and wife can never be compelled to disclose communications between themselves during marriage.

3. *A member of a court-martial* or the judge-advocate cannot be a witness for the *prosecution* (but may be for the defence). S. 50 R. 77

4. *A person* who, in the opinion of the court, is, on account of extreme youth, want of understanding, or other causes, *unable to understand the obligations of an oath*, or give a rational answer to questions asked him. M. vi 87

A witness unable to speak or hear is not incompetent, but may give his evidence by writing, or by signs, or in any other manner in which he can make it intelligible, but such writing must be written and such signs made in open court. Evidence so given is deemed to be oral evidence. M. vi 88

Compellable witnesses.—It by no means follows that because a person is *competent* to give evidence, he is therefore *compelled* to do so. There are many cases in which a witness may decline to answer a question or produce a document. 243

232. CREDIBILITY OF WITNESSES.—The effect of recent enactments has been to draw a distinction between the *competency* of a witness and his *credibility*. A convict or an atheist is not disqualified from giving evidence on moral or religious grounds, but his character may be such as to throw grave doubts on the value of his evidence, which must be taken simply for what it is presumably worth. No relationship, except to a limited extent that of husband and wife, excludes from giving evidence. M. vi 91

233. OATH OF WITNESS.—A witness before being examined must be duly sworn or permitted to make R. 82

a solemn declaration. Where a witness has to give evidence against several accused persons whose cases are being dealt with separately, he must be resworn each time, even although the court remain the same. The usual form of oath and declaration is similar to that used in a civil court. An oath or declaration is administered in such a form and with such ceremonies as a witness may deem most solemn and binding. A person desiring to be sworn in the Scotch form will swear the prescribed oath standing and holding up his right hand. Ordinarily a witness, after repeating the oath, kisses the Bible, which is held in his right hand. With a Roman Catholic the book should be closed and have a cross marked on the cover, or he may be sworn on a crucifix. Jews are sworn on the Old Testament with their heads covered. Sikhs may be sworn on the Grünth, and Mahommedans on the Koran. In the case of natives of India it is advisable to follow the practice of the civil courts of the district where the trial is held. R. 30

Refused to be sworn.—A witness who refuses to be sworn, or to give any evidence that may be legally required of him, can be punished according to his position, either by a military or civil court. S. 28 S. 126 189

234. PROSECUTOR AS WITNESS.—The prosecutor may be called as a witness either for the defence or the prosecution, but it is very undesirable that an officer who is likely to be called upon as a witness should be prosecutor. 68 R. 39 R. 77

As the prosecutor is necessarily present during the examination of all witnesses, it is obvious that if called to give evidence for the prosecution he should be examined as the first witness. He should not as a rule be required to give evidence except upon some purely formal matter, to prove a date, or to produce documents. R. 39

There may arise on active service or in exceptional cases instances where the prosecutor is of necessity a material witness for the prosecution. Care should then be taken that all statements made by him as a witness are kept distinct from any address he may make as a prosecutor.

His evidence as a witness for the prosecution would necessarily be in a narrative form, as there is no one to examine him. He can of course be cross-examined by the accused. R. 39

When counsel appears on behalf of the prosecutor the latter is deposed as it were from his position, and is subject to examination like any other witness. 70 R. 89

The prosecutor is not debarred from giving evidence after the finding as to the character and previous convictions of the accused. 120

235. MEMBER AS WITNESS.—It is not advisable to place an officer on a court-martial whose evidence as a witness is likely to be required.

The judge-advocate or any member of a court cannot be a witness for the prosecution, but may be a witness for the defence. In a recent case the officer who confined a soldier for drunkenness was placed upon the court for his trial. The proceedings were upset on the ground that the officer, though not called upon to give evidence, was practically a witness for the prosecution. A member, if called upon to give evidence, must be sworn like other witnesses in open court and be subject to cross-examination, and does not cease in any respect to be a member of the court. S. 50 R. 77

A member who has or thinks he has any special knowledge of the guilt or innocence of the accused must not communicate the same privately to other members of the court, or act on private grounds of belief. If he wishes to give evidence he must be sworn as other witnesses. M. vi 90

236. PROSECUTOR'S WITNESSES.—The prosecutor is R. 75
not bound to call all the witnesses whose evidence
is in the summary or abstract of evidence given to
the accused, but the latter has a right to ask that
any such witness whom he may desire to cross-
examine shall, if practicable, be present.

If a prosecutor calls a witness whose evidence is R. 76
not contained in the summary or abstract, reasonable
notice should be given to the accused, and if notice
has not been given the accused may demand an
adjournment of the court or a postponement of the
cross-examination.

As a matter of justice, no witness should be called
by the prosecution and examined unless the
accused has been previously made acquainted with
his name, either by the convening officer or prose-
cutor.

237. WITNESSES OF ACCUSED.—The accused should R. 14
be asked for a list of the witnesses he wishes to call in
his defence not less than 18 hours before the assem- 81
bly of a regimental court-martial and 24 hours before
that of any other court, and the convening officer
or, after the assembly of the court, the president, is R. 78
responsible that their attendance is, if possible,
secured.

If the exigencies of the service do not permit of R. 104
so long a warning being given, a written declaration
to that effect must be laid before the court-martial,
and as long a time as possible afforded to procure
the witnesses.

If the accused desires to call a witness whose R. 77
name he has not given in the list, he is himself res-
ponsible for procuring his attendance.

The accused is not bound to inform the prosecutor
as to the number or names of the witnesses he intends
to call.

An accused person at any stage in the proceedings R. 80
may apply to give evidence himself or have his wife
called as a witness, but neither the accused nor his

wife shall be called as a witness except on the application of the accused.

238. WITNESSES IN COURT.—After the arraignment of the accused the prosecutor calls his witnesses one by one before the court, and elicits from them the evidence he requires. At the close of the prosecution the witnesses for the defence are similarly called and examined. The accused is entitled to give evidence himself at any time while the evidence for the defence is being heard, but he should usually give his evidence before any other witnesses for the defence. Unless his violent conduct makes it impossible, he will be treated, while giving evidence, like any other witness, but will remain under escort.

The court may for its own information (at any time before the finding), or at the request of the prosecutor or accused person (before the time for the second address of the accused), call or recall a witness or an accused who has given evidence for the purpose of having a question put to him through the president. If a witness is recalled, the questions asked should be few and relating to the evidence previously given by that witness.

Witnesses should not be called or recalled to give any material evidence after the time for the second address of the accused, as the fact of so doing gives the right of reply, and is liable to cause confusion in the proceedings.

The court 'would do well to act on the principle that the recall of a witness whom the prosecution and defence have already had full opportunity of questioning should be distinctly for the satisfaction rather of the court themselves than of either party, and especially not with the object of supplying the omission of a prosecutor to prove a material part of his case.'

Witnesses may be allowed by the court to be called or recalled in special cases by the prosecutor to

enable him to rebut some new matter unexpectedly brought forward by the accused or a witness for the defence, or to re-establish the credibility of his witness-nesses which has been impeached. M. vi 117

Where the accused has called witnesses to character the prosecutor before the time for the second address of the accused may call or recall a witness for the purpose of proving previous convictions or entries in the conduct book against him. R. 86

239. EXAMINATION OF WITNESS.—The examination of a witness by the party calling him is called the *direct examination*, or the *examination in chief*.

Cross-examination.—The opposite side have then a right to *cross-examine* the witness in order to test the accuracy or credibility of his evidence, or to shake his credit by impeaching his motives or injuring his character.

Re-examination.—At the conclusion of the cross-examination the party producing the witness may *re-examine* him, but the re-examination must be directed exclusively to the explanation of matters referred to in cross-examination. If new matter is introduced in re-examination by permission of the court the adverse party may further cross-examine on that matter. M. vi 118

Separate Examination.—Each witness is examined separately, and witnesses (other than the prosecutor and the accused) while not under examination must be excluded from the court. This rule, however, is not so rigidly observed as to exclude the testimony of those who by inadvertence have been allowed to listen to the examination of others, although their evidence should be received with caution. In order to prevent witnesses being influenced by hearing the charge read they should be ordered out of the court when the prisoner is arraigned. R. 81 93

240. EXAMINATION IN CHIEF.—When a witness is being examined in chief all questions put must be 253

strictly relevant to the points at issue, and he must not be asked leading questions on material points.

Leading questions.—A leading question is one suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify. Leading questions can nearly always be answered by ‘yes’ or ‘no.’ M. vi 107

For example: ‘Did you see A strike B at the corner of Park Lane at noon on the 15th instant?’ would be a leading question, as it suggests the evidence required, which is that A struck B at a certain place. On the other hand, it might be fairly asked, ‘Where were you at noon on the 15th?’ ‘Did you notice any fighting or assault?’ ‘Are the persons you saw in fighting now in court?’

When admissible.—Leading questions as to points that are not material or merely introductory are generally admitted to save time. For example, a soldier might be asked, ‘Were you in No. 1 room on the morning of the 10th instant?’ when it is not disputed that he was there.

Leading questions are admissible in order to help a very youthful or unintelligent witness, or to aid the memory. In all such cases the court must use their discretion in allowing the question to be put.

After an ordinary direct examination has failed to elicit distinct replies as to the identification of a person or thing it is permissible to produce such person or object in court, and ask the witness if he can identify him. M. vi 110

When it is apparent that a witness is unwilling to give testimony, and will not answer direct questions, the party producing him may, by permission of the court, treat the witness as a hostile one, and subject him to cross-examination and ask him leading questions. A person who has called a witness is, however, not allowed to shake the credit of his own witness by impeaching his character. M. vi 111

Refreshing memory.—A witness may not read his M. vi
evidence, but may refresh his memory by referring 70
to writings made by himself when the transaction
was fresh in his memory. He may also refer to
writings made by others and read by him and known
to be correct within the time aforesaid. Any writings
so referred to must be produced, and the witness
is liable to cross-examination in respect of them. A
witness must swear positively as to the facts re-
corded, or to his conviction that the record was a
truthful one at the time when the transaction was
fresh in his memory.

241. CROSS-EXAMINATION.—When the examination in M. vi
chief is finished, the opposite side can cross-examine 112
the witness. The object of cross-examination is
to test the accuracy of the evidence already given
in every possible way, or show that the matter in
hand may be viewed in a different light. It is
not limited to the matter brought forward in the
direct examination, but extends over all subjects
relevant to the case as a whole. As a rule, cross-
examination is directed to discredit the evidence
given or the person who has given it, and great lati-
tude is allowed in putting questions.

Leading questions.—Leading questions may be put
to try to make the witness contradict himself.

Irrelevant questions.—Irrelevant questions are ad- M. vi
missible in cross-examination, and are used for the 113
purpose of throwing a witness off his guard. Though
the questions put need not be relevant to the matter
upon which the witness has been examined, they
must be relevant to the main issue before the court.
It is not allowable to cross-examine on facts which
have nothing to do with the case; or do not tend to
shake the credibility of the witness; nor can it be
assumed that fact are proved which have not been
proved, or that answers have been given which have
not been given.

Degrading questions.—Questions may be put to test M. vi the veracity, accuracy, or credibility of a witness, 114 or to shake his credit by injuring his character.

The power of casting imputations on a witness's R. 92 character is, however, somewhat limited before courts-martial. If a counsel asks a question with 103 the intention of injuring the character of a witness and so affecting his credit, and the witness objects to answer, the court should disallow the question if they think that this imputation, if true, would not seriously affect the opinion of the court.

As to previous statements.—A witness may be asked M. vi whether he has on a previous occasion made a state- 116 ment relative to the subject-matter of the action, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion; and if he does not admit that he has made such a statement, proof may be given that he did make it.

The previous statement may have been made in writing, and questions may be asked concerning it without showing the writing in question. If, however, it is intended to contradict the witness's testimony by producing the writing, it must be shown to the witness before the contradictory proof can be given.

The summary of evidence may be used to show that a certain statement was made which it is proposed to contradict, and evidence may be called to prove that the evidence of a witness, though consistent with the summary, is not consistent with the evidence given by him at the previous investigation before the commanding officer.

Cross-examination of accused.—Where the accused M. vi 93A offers himself as a witness he may be asked any question in reference to the offence charged. But R. 80 he may not be asked any question tending to show that he has committed, or been convicted of or

been charged with any other offence unless the proof that he has committed or been convicted of the other offence is *admissible* evidence that he is guilty of the offence with which he is then charged.

Evidence as to criminal acts other than those covered by the charge is *only admissible* in three cases—

(1) Where the prosecution seeks to prove a system or course of conduct of the accused.

(2) Where the prosecution seeks to rebut the defence of the accused that his actions were the result of accident or mistake.

(3) Where the prosecution seeks to prove knowledge by the accused of some particular fact.

In all cases such evidence is never admitted as proof that the accused did the act charged but only as showing the quality of that act and the guilty intention of the accused. When an accused offers himself as a witness and asks questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character or the conduct of the defence is such as to involve imputations on the character of the prosecutor or his witnesses, or when the accused has given evidence against any other person charged with the same offence, he renders himself liable to be *cross-examined as to character*.

242. QUESTIONING WITNESS.—The examination of a witness is conducted by means of questions put orally to him by the prosecutor, the accused, or the judge-advocate. R. 83

Exceptions to this rule arise when a prosecutor is himself a witness for the prosecution, and gives his evidence as the first witness in the form of a statement, or when an accused person, undefended by counsel, elects to give evidence. R. 39

The evidence is usually taken down in a narrative form in as nearly as possible the words used, but if the court or any of the parties to the trial think R. 95

it necessary, each question and answer shall be taken down verbatim.

The court or either of the parties who do not put the question may raise an objection to it. If objection is made the court should generally order the witness to withdraw until it is decided whether the question may or may not be put. R. 81

At any time before the time for the second address of the accused the judge-advocate or a member of the court may, with the permission of the court, address through the president any question to a witness. As a rule, questions would be put at the close of an examination of a witness, and before another is called. The court should always ask a witness any question which they are requested by the prosecutor or the accused to ask, and does not seem unreasonable. R. 85

Reply.—The witness in all cases addresses his reply to the court, and must not address the prosecutor or the accused in the second person, as such a mode of address may lead to altercation. R. 83

Correcting evidence.—The evidence of each witness is read out to him after he has finished, and he is asked if it is correct. Any minor alterations are, if necessary, made and verified by the initials of the president, and any material alteration or explanation should be inserted at the end, and not by way of interlineation or erasure. An explanation made by a witness renders him liable to be cross-examined or re-examined with regard to it. R. 83
M. v 66

243. PRIVILEGE AS TO ANSWERS.—A witness before a court-martial is in a similar position to one before a civil court, and the court is bound to protect him from insult, or from questions put in a needlessly offensive form. Witnesses who are competent are, however, bound to answer all questions put to them, except in the following cases:—

Criminating answer.—No one (except the accused M. vi 91 himself when giving evidence on his own application, and as to the offence wherewith he is charged) is bound to answer a question if the answer thereto would, in the opinion of the court, render the witness (or the witness's husband or wife) liable to be tried on a criminal charge or to military punishment.

The privilege of refusing to answer would not apply M. vi where the answer would render a witness liable 94 merely to a civil suit.

Degrading answer.—When a question is not rele- M. vi vant except so far as it affects the credit of a witness 114 by injuring his character, the court can exercise its R. 92 discretion in compelling him to answer, and should refuse to compel a question to be answered unless it appears that the truth of the matter suggested would affect the credibility of the witness as to the matter in issue.

An accused person who produces evidence as to his R. 80 own character or casts imputations on the character of the prosecutor or his witnesses, or who has given evidence against any other person charged with the same offence, renders himself liable to be cross-examined as to character. It must, however, be remembered that in no case may a question be put to an accused person which would be inadmissible in the case of another witness.

Professional secrets.—Legal advisers are not bound M. vi to answer questions as to confidential communica- 101 tions made to them by their clients (information with respect to a contemplated fraud being excepted). Medical men and clergymen are not privileged from disclosure of communications made to them in confidence, but it is not usual to press for disclosures made to clergymen. The expression 'legal adviser' includes the person assisting the accused during a trial.

Official secrets.—A witness is not bound to answer

questions as to *official* information of a confidential M. vi
 character, or to disclose the unanimity of opinion or 96
 otherwise of a court-martial previously held. The R. 124
 proceedings of a court of inquiry cannot be called 273
 for by courts-martial, nor is any confession or state-
 ment made at a court of inquiry admissible against
 an officer or soldier before a court-martial. The only
 exception to this rule is in the case of a court-martial
 held for the trial of an officer or soldier for wilfully
 giving false evidence before the court of inquiry.

Husband and wife.—Husband and wife cannot be 231
 forced to disclose communications which one has M. vi
 made to the other during marriage. 100

Questions, whether answered or not, should be en-
 tered on the proceedings. When a witness is not
 bound to answer a question, the court should inform
 him of his right not to answer, which the witness
 can avail himself of or not as he thinks fit.

244. CONTRADICTION OF ANSWERS.—When a witness
 is asked questions which only tend to shake his M. vi
 credit by injuring his character, the answer must be 115
 received whether true or not, and cannot be contra-
 dicted, except :

1. When a witness is asked whether he has been
 previously convicted of a felony or misdemeanour,
 and denies it or refuses to answer.

2. When he is asked a question tending to show
 that he is not impartial.

3. Where he has previously made inconsistent
 statements.

4. Where he can be shown to be a notorious liar.

In the first two cases proof may be given of the
 truth of the facts suggested. In the last two cases
 evidence may be produced of previous statements
 made by the witness, and of the opinion of other
 persons as to his character.

245. IMPEACHING CREDIBILITY OF WITNESS.—The credibility of a witness may be impeached— **232**

1. By producing evidence to contradict him ; but M. vi in such a case the witness, during cross-examination 113 should be made acquainted with the substance of the evidence to be produced.

2. By making him contradict himself.

3. By discrediting his character.

4. By bringing witnesses to swear that they, from M. vi their knowledge of the witness, believe him to be 117 unworthy of credit on oath. Such persons may not, on their examination-in-chief, give reasons for their belief, but they may be asked their reasons in cross-examination and their answers cannot be contradicted.

The party, the character of whose witnesses is impeached, may give evidence in reply, to show that the witnesses are worthy of credit.

246. CONTEMPT OF COURT.—A witness subject to military law who is guilty of any contempt of court can be tried for *contempt* by a court other than that before which the offence was committed, or, if he insults the court or disturbs the proceedings, may be imprisoned by its order under the hand of the president for a term not exceeding twenty-one days. In the case of a soldier he may be sentenced to undergo detention for a similar period. **189 228 233 S. 28**

If a person not subject to military law commits contempt of a military court, the president may, under his hand, certify the offence to any civil court which has the power of dealing with such an offence, and that court may punish the witnesses in like manner as if he had committed the offence against itself. **S. 126 S. 180**

CHAPTER XXV

EVIDENCE

247. INTRODUCTORY REMARKS. 248. EVIDENCE—Direct—Circumstantial. 249. FACTS NOT REQUIRING PROOF. 250. FACTS REQUIRING PROOF—Substance of Charge—Special Findings. 251. THE BURDEN OF PROOF—Presumption—Of Criminal Intent—Of Theft—Other Presumptions. 252. RULES OF EVIDENCE. 253. RULE OF RELEVANCY—Offences connected together—Facts showing Intention—Facts showing Motive—Cases of Conspiracy—General Disposition—Character. 254. RULE OF BEST EVIDENCE—One Witness sufficient—Secondary Evidence—Depositions—Documentary Evidence—Public Documents—Private Documents. 255. RULE AS TO HEARSAY—Dying Declarations—Statements as part of *res gestae*—Summary of Evidence—Public Documents. 256. RULE AS TO OPINION—How far Admissible—Experts. 257. ADMISSIONS. 258. CONFESSIONS—When Involuntary—When Voluntary—Proof of Facts revealed—Previous Confessions. 259. REMARKS.

247. INTRODUCTORY REMARKS.—The rules or laws S. 127 of evidence were originally framed with reference to S. 128 trial by jury, and it is laid down that the rules R. 73 which guide courts-martial in admitting or rejecting evidence should be the same as those used in the ordinary civil courts of criminal or summary jurisdiction.

In trials by jury person unacquainted with law give a verdict as to the matters of fact alleged in the

charge, and the judge pronounces the sentence which is the legal consequence of the verdict.

In trials by court-martial the members of the court form both judge and jury, and have both to decide as to facts and award a sentence.

In order to decide on questions of fact it is necessary for a jury to hear the evidence or testimony upon which the charges are founded, and from which they are proved.

The judge has to assist the jury in coming to a fair decision, provide that the prisoner has no injustice done to him, and prevent time from being wasted by matters irrelevant to the issue tried being entered into. The rules or laws of evidence in accordance with which a judge guides a jury and regulates the manner in which testimony is brought forward are in principle those which must be followed by members of a military court in the reception of evidence.

The exclusion of certain classes of statements from evidence in judicial proceedings has many advantages. *It assists the jury* or court-martial by concentrating their attention on the issue before them and preventing them being bewildered or misled by irrelevant statements. *It secures fair play to the accused*, as it limits the evidence to the specific charge which he comes prepared to meet. *It protects absent persons* against statements affecting their character. And, lastly, *it prevents waste of time* by confining the evidence to the points at issue.

248. EVIDENCE is the testimony upon which facts are believed, and consists of—

1. Statements made by witnesses (or by the accused) Sth. 2 in court under legal sanction in relation to matters of fact under inquiry, or *oral* evidence.
2. Documents produced for the inspection of the court, or *documentary* evidence.

In all judicial inquiries the information must be

given on oath, and be liable to be tested by cross-examination.

Evidence may be either *direct* or *indirect*.

Direct evidence is the statement of a witness who M. vi testifies as to his having seen or otherwise observed 41 with his senses the facts in question.

Indirect or circumstantial evidence is testimony as to certain facts from which the facts in question may be inferred or presumed.

Direct evidence is not necessarily better than indirect or circumstantial evidence, the difference between them being one not of *degree*, but of *kind*.

Before deciding upon the difficult question as to what statements or documents are legally admissible as evidence, it is necessary to make clear what has to be proved and who has to prove it.

249. FACTS NOT REQUIRING PROOF.—Certain facts M. vi 10 are assumed to be judicially known. It is not necessary to receive proof as to the facts which courts R. 74 are bound judicially to recognise, such as the existence of Acts of Parliament, or military regulations, or to require evidence on matters which an officer may reasonably be expected to know, or on facts which are generally admitted as being beyond controversy.

250. FACTS REQUIRING PROOF.—*It is sufficient to* M. vi 9 *prove the substance of the charge* in connection with the specific offence for which the accused is being tried, and there are usually certain allegations which do not materially affect the validity of the charge. For instance, it may be apparent that there is a trifling error in the names, dates, or places mentioned in the particulars of the charge, or a man may be charged with using insubordinate language, and it may appear that there is some slight discrepancy as to the actual words used. In such cases 221 the court may, before they have begun to examine R. 33

witnesses, refer the matter to the convening officer, R. 44 or may subsequently amend the particulars in question by a special finding. The time of the court need not be taken up in receiving a quantity of evidence on a point which is not material to the actual offence charged.

Special findings.—In some cases the proving of the substance of the charge may lead to the accused being convicted of an offence technically similar or less serious in degree than that with which he is charged. For instance, in a case of murder, the killing of a person is the essence of the charge, but the evidence may go to prove that it was not done ‘wilfully with malice aforethought,’ and the crime is thus reduced to manslaughter. Again, in the case of desertion, the substance of the offence is the absence of the man, and hence, if intention not to return is not proved, he can be found guilty of absence without leave. 119
M. vi 8

A man charged with certain offences may be found guilty of cognate offences, and a man charged with an offence committed under circumstances involving a higher degree of punishment may be found guilty of the same offence under circumstances involving a less degree of punishment. S. 56
R. 44

251. THE BURDEN OF PROOF.—He who affirms a fact must prove it. If a person be charged with drunkenness, it is for the prosecutor to prove that he was drunk, and not for the accused to prove that he was sober.

Presumptions.—There are certain rules of law called *St. 1 presumptions* which justify a court in drawing a particular inference from a particular fact or evidence, and the existence of these presumptions or affirmations of the law causes the burden of proof to be shifted in some cases from the prosecutor to the accused.

Presumption of criminal intent.—When a man commits an unlawful act, it is *presumed* that he meant to do it, and it rests with him to prove that he did not intend to do it. Thus a person is being tried for shooting at a man, which is an unlawful act. The law presumes that he meant to kill him, and it is for the accused to prove that the death arose from accident or in self-defence. M. vi 14

When an act, which is not in itself unlawful, leads to the commission of an offence, it will rest with the prosecution to prove the intention to commit the offence. For example, a soldier is at target practice, which is a lawful act, and his bullet strikes a bystander near the target. It will be for the prosecution to show that the soldier fired with intent to kill, or was culpably negligent in not taking sufficient precaution.

Presumption of theft.—Again, a quantity of property known to have been stolen is found in a person's house. A guilty knowledge concerning the theft is presumed, and it rests with the receiver to prove that the articles were innocently received.

Other presumptions.—There are many other presumptions, of which the principal are—

1. That every man is innocent till the contrary is proved.

2. That all necessary things have been done; for instance, on the trial of a soldier it is presumed that he has been attested.

3. That everyone is acquainted with the law. Ignorance is no excuse. When an order is issued, it is presumed that it has been made known to all whom it directly concerns.

4. When an action is done which is injurious to another, *malice* is presumed.

5. A child born in wedlock is presumed to be legitimate.

6. A letter properly addressed and posted is deemed to have been received.

7. A person who has not been heard of for seven years is presumed to be dead.

When a presumption exists, it will rest with the party who denies the facts to prove that the presumption is not correct.

252. RULES OF EVIDENCE.—There are many rules or maxims of evidence which are mainly of a negative character, and lay down the sort of evidence which must be excluded from consideration. Of these the principal are—

I. Nothing shall be admitted as evidence which does not tend either directly or indirectly to prove or disprove the charge, or (in other words) the evidence must be confined to the points at issue.

II. The best evidence must be produced which the nature of the case admits of.

III. Hearsay is not evidence.

IV. Opinion is not evidence.

253. RULE OF RELEVANCY.—*Nothing shall be admitted as evidence which does not tend either directly or indirectly to prove or disprove the charge, or (in other words) the evidence must be confined to the points at issue.* The points or facts at issue are those affirmed by one side and denied by the other, and the evidence must be relevant to the facts at issue. There is considerable difficulty in drawing the line between ‘relevant’ and ‘irrelevant’ facts, as matters apparently unconnected with the charge may indirectly bear upon it.

Evidence which does not directly bear on the charge is relevant in the following cases:—

Offences connected together.—When several offences are connected with each other so that they form part of one transaction, evidence of one offence is admissible in proof of another. When a person is charged with a specific offence, any evidence as to

other offences must only be entered into sufficiently to prove some part of the charge and no more.

In a charge for stealing certain articles it is not necessary to inquire into the stealing of goods not mentioned in the charge, but evidence might be taken to show that goods stolen from adjoining premises the same night were found in the possession of the accused, as it would afford a strong proof that he was at or near the premises mentioned in the charge. Again, in the case of a person being tried for setting a house on fire, evidence might be received that articles belonging to the house were found to be secreted in his possession.

On a charge of desertion it may be admissible to inquire into the *fact* (but not the attendant circumstances) of a highway robbery which had been committed by the accused, on the night on which he absented himself, and for which he had been tried and convicted by a civil court, or evidence may be received as to the accused selling his uniform, buying plain clothes, etc., in order to show that the commission of such offences proved that he had the intention of leaving the service.

Facts showing intention.—Facts showing the intention or state of mind of the accused are generally admissible, provided they do not refer to his general character or disposition, but are strictly confined to the matters mentioned in the charge. M. vi 22

A is being tried by a civil court for the murder of B. Evidence could not be received that A had previously murdered C or other persons, but a former attempt to murder B might be brought forward as proving an intention to murder him.

In support of a charge for disrespectful language the prosecutor, to show the spirit and intention of the accused, after having proved the words in the charge, may prove also that he used disrespectful words on the same subject, either before or after-

wards. This evidence is admissible, not in aggravation of the crime charged, but for the purpose of proving that the disrespect imputed in the charge was wilful and deliberate. The accused, on the other hand, may produce evidence to show that he had been provoked to act as he did by the conduct of the superior towards him.

Facts showing motive.—Evidence showing the motive of the accused or suspicious conduct after committing a crime is admissible. For instance, in a case of burglary, it might be proved that the accused absconded, or that he had hidden the tools with which he had committed the offence. M. vi 2

When a person is tried for murder, evidence might be received that he held a policy of insurance on the murdered person's life.

Cases of conspiracy.—In cases of conspiracy the acts, statements, or writings of any one of the conspirators in furtherance of the common purpose can be brought in evidence against the other conspirators. A statement made by one conspirator which is merely a relation or narrative of some event forming part of the conspiracy, but is not in itself part of the conspiracy, falls within the rule of hearsay, and is not admissible as evidence against another conspirator unless made in his presence. M. vi 2

In the following cases evidence is not admissible :—

As to general disposition.—Evidence as to the general disposition or tendency of the accused to commit a crime is not admissible. In cases of insubordination it would not be right to prove that the accused had been previously insubordinate on other occasions for the purpose of showing a tendency to insubordinate conduct. M. vi 2

Courts-martial have generally, in cases of drunkenness, to receive evidence of previous instances, but this is done for a certain purpose, and must not in-

fluence the court in finding a man guilty of the particular act charged.

As to character.—A man must not be convicted of an offence because he has a bad name. The prosecution cannot, therefore, give evidence as to character as showing the guilt of the accused. If, however, an accused person gives evidence himself or calls witnesses as to his good character, the prosecutor may test the evidence by means of cross-examination, and may prove the fact of there being previous convictions against him. The accused can always bring evidence in favour of his general good character, which the court must weigh in proportion to its relevancy to the crime with which he is charged. Such evidence cannot avail against evidence of facts, but where some reasonable doubt exists as to his guilt, it may tend to strengthen a presumption of innocence.

M. vi 17

R. 40

R. 86

254. RULE OF BEST EVIDENCE.—*The best evidence must be produced which the nature of the case admits of.*—The meaning of this rule is that no evidence shall be admitted which leaves ground for supposing that other and better evidence remains behind in the possession or power of the party producing it.

From the circumstances under which crimes are committed it follows that direct evidence of their commission is rarely obtainable, and that in the great majority of cases reliance must be placed on circumstantial evidence. In admitting the latter it is useful to remember that the ‘facts on which it is sought to found the inference of guilt must be visibly and evidently connected with the crime.’ Before a court finds a person guilty on circumstantial evidence it must be satisfied not only that the circumstances are consistent with the accused having committed the act, but that they are inconsistent with

248

M. vi 43

any other rational conclusion than that the accused was the guilty person.

The law lays down that the evidence shall be the best, but does not define the amount to be received.

One witness sufficient.—To prove a fact the evidence of one credible witness (except in cases of treason, treason-felony, and perjury) is enough, provided that it satisfies the court. If a soldier struck an officer on parade, the evidence of one or more men who actually saw the blow would be the *best* evidence, and the testimony of the remainder of the soldiers on parade it would be unnecessary to receive. M. vi 45

The evidence of an accomplice is admissible against his principal, and *vice versa*. But if an accused person has given evidence himself and his evidence tends to criminate another person charged with the same offence, that other person can cross-examine him as to character. 231
M. vi 85
R. 80

The evidence of a single accomplice is in law sufficient for a conviction, but it is the practice to require it to be confirmed by unimpeachable testimony in some material part.

In a trial by court-martial, where the court performs the functions of both judge and jury, it may be laid down that no one should be convicted on the uncorroborated testimony of an accomplice. The corroboration required must not be merely as to the circumstances of the crime; it must be corroborative of the guilt of the person charged.

Secondary evidence.—When the best legal evidence is proved to the court to be unattainable, then, and then only, is the next best or *secondary* evidence admissible.

The deposition on oath of a witness could not therefore be received unless the attendance of the witness himself has been proved to be physically impossible. 255

Special provision is made by statute for the reception by a civil court of the evidence of a material witness who has given evidence at a preliminary inquiry and cannot attend at the trial.

In such a case the *deposition* or the duly attested M. vi 57 written statement of a witness who is unable to attend from death or illness, and who gave the statement on oath in the presence of a justice and of the accused person, who had an opportunity of cross-examining him, is admissible when a court-martial is trying civil offences under S. 41.

Depositions are therefore only admissible before R. 65 courts-martial in exceptional cases, but military courts have the power, not possessed by civil ones, of adjourning to the abode of a sick person.

Documentary evidence.—There is little difficulty in M. vi 31 applying the rule as to the best evidence, except in the case of documentary evidence. The sub-rules to be followed are—(1) that a verbal account of the contents of a document can never be received if the document itself is obtainable; (2) that, subject to certain exceptions, a copy of a document is not admissible when the original document can be produced. The rule as to the admissibility of a copy of a document is applied much more strictly to private than to public or official documents.

Public documents.—Public documents are held to be M. vi 37 the acts of public functionaries in the execution of their business, and are receivable as such by virtue of Parliamentary statutes. They include Acts of Parliament, Acts of foreign or colonial States, proclamations or orders of the Crown, judgments of courts, official and public records, documents of corporations and companies, bye-laws, entries in registers, and other books of a public nature.

Primary evidence of a public document may be given by producing the document from proper custody, and by a witness identifying it as being what it

professes to be. Public documents may also always be proved by secondary evidence, which would usually take the form of a printed copy or a written copy or extract duly certified by a proper official. S. 163

Special provision is made in the Army Act for proving by means of copies or certified extracts the contents of the following documents:—

1. Papers in reference to attestation and enlistment. S. 163

2. Papers in reference to a man's service or discharge.

3. Army lists, Royal warrants, Army orders, King's regulations, and official rules and regulations and gazettes printed by Government.

4. Notices addressed to Army Reserve men. R.F.A.

5. Descriptive returns. 24

6. Proceedings of courts-martial. S. 165

7. Certificates of civil convictions. S. 164

8. Records in the ordinary regimental books, which include the declaration of court of inquiry on illegal absence, and form of confession of desertion and fraudulent enlistment. S. 72
S. 73
281

With the exception of the Army Lists, gazettes, etc., referred to in (3) none of the above documents should be received in evidence by a court-martial unless they are properly 'put in' by a person who has been duly sworn.

Private documents.—Private documents are all letters, official or private, private accounts, receipts, etc., and any papers which do not come under the head of public documents.

Documents, other than public documents or documents for the proof of which special provision has been made by statute, are not admissible as evidence of the facts they relate, but may be brought forward for other purposes. 255

As a rule affidavits, statements by recruiting officers, police constables, postmasters, etc., are inadmissible, but documents made by the accused

or under his sanction or with his privity may be received.

When private writings are brought before a court, the originals must be produced for inspection (primary evidence) and the handwriting, if not admitted, must be proved.

Secondary evidence of the contents of a private document may be given in the following cases:— M vi 35

(a) Where the original is in possession of the adverse party, and he, having been served with notice to produce it, does not do so.

(b) Where the original is in court, but in possession of a witness who is not legally bound to produce it, and refuses to do so.

(c) Where there is good reason to believe the original is lost or destroyed.

(d) Where the original is from nature, bulk or locality unable to be removed or procured.

(e) Where the original is a document for the proof of which special provision has been made by the statute.

Secondary evidence of a private document is usually given by producing a copy and calling a witness who can prove the copy to be correct, or where no copy is obtainable by calling a witness who has seen the document and can give an account of its contents.

255. HEARSAY IS NOT EVIDENCE.—Hearsay evidence M. vi 46
means the statements, whether in writing or not, made in the absence of the accused by persons not called as witnesses, and who, therefore, are not on their oath nor liable to cross-examination.

This rule does not exclude statements made in the presence of the accused, but evidence of any such statement, although admissible as showing his conduct when he heard the statement, is not evidence that the statement was true. Evidence that A. B. said to the accused, 'You stole C.'s watch,' is ad- M. vi 48

missible to show the conduct of the accused on hearing the accusation, but is not evidence to prove that he did in fact steal the watch as alleged.

If the conduct or remarks of the accused on hearing the statement is such as could not reasonably be construed as an admission, the court should reject the whole of the statement and pay no attention to it.

The term 'hearsay' is primarily applicable to what a witness has heard another person (not before the court) say with respect to the facts in dispute.

The statement of a person who is not called as a witness is none the less 'hearsay' because it has been reduced to writing and is offered in that form to the court. Documents, other than public documents or those for the proof of the contents of which special provision has been made by statute, cannot therefore be admitted as evidence of the facts they relate. A copy of a marriage register, which is a public document, is, if duly attested, a proof of a marriage, but a letter from a clergyman stating that he had solemnised a marriage, or from a person stating that he had inspected the register, could not be accepted as evidence.

The rule as to the exclusion of hearsay evidence is subject to the following exceptions:

1. *Dying declarations.*—In trials for murder and manslaughter a declaration made by the person killed *as to the cause of his death*, or as to any of the circumstances of the transaction that resulted in his death, is admissible, provided it be proved that he fully believed he was in actual danger of death, and had given up all hope of recovery. M. vi 4

2. *Declaration made by a deceased person against his interest.*—The statements made by a person since deceased against his pecuniary or proprietary interest, whether written or oral, is admissible. M. vi 5

3. *Statements as part of res gestæ.*—Res gestæ are the acts or transactions which are the subject of investigation. Where statements are so immediately

connected with an offence as to be considered virtually a part of the *res gestæ*, or the immediate and natural effect of them, they are admissible even if made in the absence of the accused.

When it is intended to prove the state of health of a person at a particular time evidence may be given of expressions indicative of that state used by him at the time, *e.g.*, in a poisoning case statements made by the deceased before his illness as to his state of health and during his illness as to his symptoms, were admitted as evidence. M. vi 54

In trials for rape, evidence is allowed to be given as to the fact that a complaint had been made by the person assaulted shortly after the offence was committed and as to the particular terms of the complaint so far as they relate to the charge. M. vi 53

4. *Statements made by a deceased person in the strict course of business.*—Statements or writings with reference to the charge, made by a deceased person in the ordinary course of professional business, would be admitted. Where a letter had been destroyed, a copy taken by a deceased clerk in the usual letter-book would be evidence of its contents. M. vi 56

Private writings may be used to prove the motive or intention of the accused, or may be admitted as proof of a document having been written when writing the document is the essence of the charge. For example, the best evidence of having written an insubordinate letter is the letter itself.

The summary of evidence which is of the nature of a private writing cannot be admitted as evidence of the facts therein contained except where the accused has pleaded guilty. It may, however, be used to show that a witness has made a particular statement or has contradicted himself. The summary of evidence cannot otherwise be used as evidence, and as a court is liable to be biassed by statements in it, it is usually expedient that no one but the president should refer to it. M. vi 58
107
R. 17

Any statement (but not the evidence) of the accused contained in the summary of the evidence (being of the nature of a voluntary confession) is, however, usually read to the court as evidence, whether it be in his favour or not. The summary of evidence of a witness who is not before the court cannot, of course, be referred to. M. vi 81
258

Public and official documents.—The rule as to ‘hearsay’ evidence is also subject to important qualifications in its application to public and official documents. Certain public documents, such as Acts of Parliament, Proclamations and Orders of the Crown, official books, records and registers, etc., are made by statute evidence of the facts to which they relate. M. vi 60

Similarly, under the special provisions of the Army Act, attestation papers, letters and documents respecting service, Army lists, gazettes, warrants and orders made in pursuance of the Act, records in regimental books, descriptive returns and certificates of conviction and acquittal are made evidence of the facts stated by them. M. vi 62

256. OPINION IS NOT EVIDENCE.—The general rule is that the opinion or belief of a witness as to the facts in issue is not admissible in evidence. For instance, in a case of desertion the evidence of a witness would be taken as to the facts of illegal absence, etc., but the *opinion* of the witness that the accused had deserted would not be received, as that is an inference to be determined by the court. M. vi 63

How far admissible.—This rule does not include evidence which from its nature cannot always be sworn to positively. Thus, for instance, a witness may swear as to the identity of a person or thing *to the best of his belief*. M. vi 68

Similarly, opinion can be received as to the conduct of an accused person, or his deportment or language in reference to facts beyond the knowledge

of the court. A witness might testify that he saw the accused at a certain time, and that in his opinion he was drunk.

When facts cannot be sworn to positively, a witness who falsely swears he 'thinks' or 'believes' some fact is true is liable to be convicted of perjury.

Experts.—The principal exception to this rule as M. vi 64 to opinion is the opinion of an expert, which can be received on any point within the range of his special knowledge. In a poisoning case a doctor may give his opinion that a certain poison produces certain symptoms, but he could not give his opinion that the death in question was accompanied by those symptoms unless he perceived them himself as an ordinary witness.

An officer may be asked, as an expert, to give his M. vi 66 opinion on a point within his special military knowledge, but to make his opinion admissible, his knowledge must be of a kind not possessed by the court generally.

The opinion of an expert in handwriting, or a M. vi 67 person acquainted with a particular handwriting, may be received.

257. ADMISSIONS.—It is the practice to allow either M. vi 72 party the option of admitting in open court the authenticity of orders or letters, or the signature of a document, or the truth of a copy in cases where the original writing is receivable when proved, or that certain items in an enumeration of stores or in an account are correctly stated, or that a promise or order was actually given, or a certain letter sent and received, or in other similar cases where admissions may expedite the proceedings, and do not go into the merits of the matter before the court.

In criminal proceedings, admissions by the accused of matters relating to an alleged offence, as distinguished from actual confession of the offence itself,

are, strictly speaking, not receivable as evidence. This does not extend to acts done or things said by the accused as part of the *res gestæ*, which, until explained by him, raise a presumption of guilt. A letter by a person charged with an offence apologising for the offence, would ordinarily be a confession; but a letter admitting some of the facts alleged, but explaining them so as to show there was no criminality in them, would ordinarily not amount to a confession. An entry by the accused in the account book which it was his duty to keep of a sum of money would be admissible as evidence that he received the money.

258. CONFESSIONS.—Confessions, *if voluntary*, are M. vi 73 deemed to be relevant, but, as a general rule, only against the persons who make them.

If any part of a confession is given in evidence, M. vi 80 the whole must be received, and not merely the portion disadvantageous to the accused.

A confession made by one accomplice in the presence of another is admissible against the latter, not as evidence of the facts which it states, but as explanatory or introductory to any admissions that may be made by the latter accomplice.

When involuntary.—No confession is deemed to be voluntary if it appears to have been caused by any threat, inducement, or promise proceeding from a person *in authority*, and if in the opinion of the court such threat, inducement or promise gave the accused person reasonable grounds for supposing that he would gain some advantage in reference to the proceedings against him. M. vi 75

The inducement must have some reference to the escape of the accused from the charge made against him, and must be made by a person who has some power in relieving him either wholly or partially from the consequences of the charge, such as a con-

stable, magistrate, prosecutor, and in some cases the person against whom the offence was committed.

When voluntary.—A confession made in consequence of inducements held out by persons not in authority, or caused by religious exhortation, or by inducements which have no reference to the escape of the accused from the charge, are deemed voluntary. Thus a gaoler, who is a person in authority, states to a person in custody that a pardon has been promised to anyone who confesses. The confession made in consequence is deemed involuntary and cannot be received. If, however, the gaoler promises the same person that he will allow him to see his wife if he confesses, the confession is voluntary. M. vi 76

A confession is not inadmissible because it was made under promise of secrecy, or in consequence of deception, but a court-martial would seldom receive any confession obtained by fraud, though they might legally do so. M. vi 79

Proof of facts revealed.—Although an involuntary confession cannot be received in evidence, yet if such confession reveals a certain fact, that fact can be proved. For example, a person accused of burglary makes a confession to a policeman under circumstances which prevents it being received. In it he states that he threw a lantern into a pond. The fact that he said so, and that the lantern was found in the pond, may be proved. M. vi 78

Previous confessions.—Evidence in the nature of a confession given in previous proceedings may be used against the person who gave it. Thus a statement made voluntarily by a soldier to his commanding officer acknowledging an offence might be received in evidence at a subsequent trial. M. vi 81

The proceedings of a court of inquiry, or any confession or statement made before such court, cannot, however, be used as evidence against an officer or R. 124

soldier before a court-martial unless the offence of wilfully giving false evidence before the Court of Inquiry is the subject of trial.

259. REMARKS.—The rules of evidence to be followed by S. 128 courts-martial are to be those adopted in courts of ordinary criminal jurisdiction. Fortunately, in cases dealt with by court-martial there are generally but few witnesses and the issue to be tried is simple and clear. The main principles to be remembered may be summed up as follows :—

1. The evidence must be relevant to the issue, and the best procurable.

2. It must not be in the nature of hearsay or opinion.

3. Confessions, admissions, or documents must be legally admissible, and the latter should be verified and properly 'put in' by a person who has been duly sworn.

4. The witnesses must be legally competent, and their examination properly conducted.

CHAPTER XXVI

FIELD GENERAL COURTS-MARTIAL

260. FIELD GENERAL COURTS - MARTIAL — Provost-Marshals. 261. CONVENING OF COURT. 262. COMPOSITION OF COURT. 263. GENERAL PROCEDURE. 264. CHALLENGE. 265. SWEARING COURT. 266. CHARGE. 267. PLEA. 268. EVIDENCE. 269. FINDING. 270. SENTENCE. 271. CONFIRMATION. 272. GENERAL PROVISIONS.

260. FIELD GENERAL COURTS-MARTIAL.—On the S. 49 consolidation of the Mutiny Act and Articles of War R. 105 in one statute in 1879 field general courts-martial were authorised to be formed in order to replace the detachment general courts-martial, which were constituted (originally in the Peninsular War) to deal with offences of pillage and outrage committed by persons subject to military law against the inhabitants of a country beyond the seas in which a military force was serving.

At the same time summary courts-martial were instituted to try all offences committed by persons subject to military law *on active service*, which, with due regard to the public service, could not be tried by an ordinary court-martial.

In 1893 summary courts-martial were abolished, and the power of the field general courts-martial was extended, so as to deal with all offences committed abroad and on active service, subject to slight modifications as to the convening of the courts and the confirming of the sentences.

Provost-Marshals.—‘ By the custom of British S. 74

armies the provost has been in the habit of punishing on the spot, even with death, under the orders of the Commander-in-Chief, soldiers found in the act of disobedience of orders, of plunder, or of outrage.' Provost-marshals cannot now inflict any punishment on their own authority, but are purely executive officers who arrest and detain offenders and carry out sentences of court-martial. For the prompt repression of all offences that may be committed *abroad* these officials may be appointed by a general in command, and, when on active service, they have important duties to perform in connection with the maintenance of good order in the force. As respects soldiers in their custody undergoing field punishment, they have the same powers as the Governor of a military prison. At home a provost-marshal (who is also commandant of the corps of military police) and two assistant provost-marshals are appointed by the King. On mobilization the number of these officers would be increased.

K. 599

261. CONVENING OF COURT.—A field general court-martial may be convened—

S. 49

R. 105

(1) By an officer in command of a detachment in any country beyond the seas when *not on active service*, where complaint has been made to him that offences have been committed by persons *under his command* against the property or persons of the inhabitants of such country.

(2) By the commanding officer, or officer in immediate command of a body of troops *on active service* for the trial of offences committed by persons subject to military law.

In the first case the convening officer should have been authorised to convene field general courts-martial by the general officer in command of the forces to which he belongs. In both cases satisfactory assurances must be obtained that it is not practicable to try the offender by an ordinary general

court-martial and—where the convening officer is not a commanding officer or is below the rank of field officer—that it is not practicable to delay the trial for reference to a superior officer.

- 262. COMPOSITION OF COURT.**—The court must consist of not less than three officers, unless the convening officer is of opinion that three officers are not available, in which case he, if not unavailable as confirming officer or otherwise, may appoint himself as president. Where until any exigencies prevent compliance with the above regulation as to three officers, and delay is impracticable, two officers will be appointed to form the court. If practicable, the president should not be below the rank of field officer, and the members should not have less than one year's service, but officers of not less than three years' service, if available, should be appointed. A provost-marshal, assistant provost-marshal, prosecutor, or witness for the prosecution, cannot sit on the court. R. 106
R. 107

- 263. GENERAL PROCEDURE.**—The form of proceedings as laid down for field general courts-martial should be adhered to as closely as possible. It will be noticed that these proceedings consist merely of a formal order convening the court, a certificate from the president that the trial was duly carried out, and a formal confirmation. In a schedule is inserted the name of the offender, the offence charged, the plea, finding, sentence, and confirmation. App. II.

If military exigencies in the opinion of the convening officer do not admit of the above simple form being used, the court may be convened and the proceedings carried out without any writing. The provost-marshal, however, if present, and if there is not one, both the president and the officer charged with promulgation must keep a record, adhering as far as possible to the official form; and in it must be noted *at least* the name (or, if the name is not known, the description) of the offender, the R. 107

offence charged, the finding, sentence, and confirmation, and any recommendation to mercy.

In all cases when military or other exigencies prevent a court of three officers being assembled, or the use of the authorized form of proceedings, a special report must be made to the officer who, if a field general court-martial had not been convened, would have had power to convene a general court-martial to try the offender.

The court may be sworn to try any number of R. 109 offenders, but each accused is tried separately, except in the case of offences committed collectively.

The court is an open one, and the parties to the trial are brought before it in the usual way.

- 264. CHALLENGE.**—The name of the officers composing R. 110 the court are read over in the hearing of the accused, and he is asked if he objects to be tried by any of them.

If *any member* of the court thinks that an objection raised by the accused is reasonable, steps must be taken to constitute a court composed of officers against whom he has no reasonable objection.

- 265. SWEARING COURT.**—The president and members R. 111 and interpreter (if any) are duly sworn in the pre- R. 115 scribed manner, or, if there is a sincere objection to take an oath, are allowed to make a solemn declaration to the same effect.

- 266. CHARGE.**—The charge which should briefly disclose R. 108 an offence under the Army Act is read out to the R. 112 accused by the president, who will give, if necessary, a full explanation as to the exact act or omission charged, and will ask the accused whether he is guilty or not of the offence.

- 267. PLEA.**—The accused on being asked to plead can R. 113 either plead 'guilty' or 'not guilty' or offer a special plea against the jurisdiction of the court or

in bar of trial. If the special plea is considered by the court to be valid they must report the fact at once to the convening officer.

268. EVIDENCE.—The witnesses for the prosecution will R. 114
be called, and the accused will be allowed to cross- R. 115
examine them and give evidence himself or call any
available witnesses in his defence. An oath or
solemn declaration shall be administered to every
witness. A summary of the evidence will be taken
down in writing and attached to the proceedings
whenever the circumstances of the trial admit of it.

The accused must always have full opportunity R. 116
of explaining his case and will be asked what he has
to say in his defence, and shall be allowed to make his
defence.

269. FINDING.—In the case of an equality of opinions R. 117
on the finding the accused is acquitted. A finding of
acquittal requires no confirmation ; and if it refers to
all the offences with which the accused is charged he is
at once released from custody.

270. SENTENCE.—The court, if consisting of three or R. 118
more officers, may award any sentence which a
general court-martial can award ; but if the court
pass sentence of death the whole court must concur.

The court, if consisting of two officers, may award
any sentence authorised for the offence, not ex-
ceeding field punishment or two years' imprisonment.

Recommendation to mercy.—Any recommendation to R. 118
mercy will be attached to the proceedings and com-
municated to the accused, together with the finding
and sentence.

271. CONFIRMATION.—Except in the case of acquittal R. 120
no finding or sentence is valid until it is duly con-
firmed.

A provost-marshal or an assistant provost-mar-
shall or a prosecutor can in no case confirm the
proceedings.

A member of the court cannot confirm its proceedings, unless it is not practicable to delay the case for reference, in which case he may confirm provided he is a person otherwise qualified to do so.

Where a court is convened beyond the seas, and *not on active service*, the proceedings must be confirmed by an officer authorised to confirm the proceedings of general courts-martial.

Where a court is convened *on active service*, the proceedings will be confirmed by the senior officer on the spot, if of field rank, and, if he is not of field rank, by the nearest available field officer.

Where a sentence of death, penal servitude, imprisonment or detention is confirmed, the proceedings are to be transmitted to the officer in chief command of the forces in the field, and a sentence of death or penal servitude shall not be carried into effect pending his decision. When, by reason of distance or the operations of the enemy, such reference is impracticable, the general or field officer commanding the force with which the accused is present, is empowered to give a decision.

No reference is necessary when the punishment awarded, by commutation or otherwise, is less than detention, but a confirming officer may if he thinks it desirable reserve any finding or sentence for confirmation by superior authority.

Revision.—The confirming officer cannot send back R. 120 the finding and sentence for revision more than once, nor recommend the increase of a sentence, and on revision the court cannot take any fresh evidence or increase the sentence.

272. GENERAL PROVISIONS.—*Voting.*—After the Court R. 117 is sworn, with the exception of the finding and a R. 118 sentence of death, which are specially provided for, every question is determined by a majority of votes, and in the case of equality the president has a casting vote.

Remand of accused.—If after the commencement of R. 119 the trial the court are of opinion that a prisoner should be tried by an ordinary court-martial, they should strike his name out of the schedule and remand him.

Remarks.—The proceedings shall be held in open R. 119 court in the presence of the accused, except on any R. 121 deliberation among the members when the court may be closed.

The court may adjourn from time to time, and may, if necessary, view any place. The rules as to mitigation of sentence, confirmation notwithstanding informality, transmission and preservation of proceedings, payment for copies of proceedings and loss of proceedings, shall be in accordance as far as practicable with those governing district courts martial.

CHAPTER XXVII

COURTS OF INQUIRY

273. COURTS OF INQUIRY—Composition—Procedure—Inquiry affecting Character—Inquiry respecting Stores—Inquiry as to Injuries—Inquiry on Prisoners of War. 274. COURT ON ILLEGAL ABSENCE. 275. COURTS OF INQUEST. 276. BOARDS.

273. A COURT OF INQUIRY may be assembled by order R. 124 of the Army Council or by the officer in command K. 666 of any body of troops, whether belonging to one or more corps, to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed; it is directed to collect evidence and, if so required, to report on any transaction into which the convening officer cannot conveniently himself make inquiry. Notice of the time and place of the meeting of the court should be given to all persons concerned in the inquiry, but a court of inquiry has no power to compel the attendance of civilian witnesses.

Composition.—The court may be composed of any number of officers of any rank and of any branch or department of the service, according to the nature of the investigation. Three members, the senior acting as president, will, in ordinary cases, be sufficient. The officer assembling a court of inquiry, committee, or board will appoint a president by name, or, failing such an appointment, the senior member will preside. When the convening officer has so appointed a president, no officer senior in rank to the

president will be detailed to serve as a member of the court of inquiry, committee, or board.

A court of inquiry on loss, damage, or deficiency K. 670 of stores, animals, equipment, supplies, buildings or other property belonging to the public will, if possible, be composed of officers not belonging to the unit or department concerned.

Members of a court of inquiry in a case which is R. 19 subsequently the subject of a court-martial are not to be detailed as members of the court-martial.

Procedure.—The members of the court will not R. 124 themselves be sworn, nor will they take evidence on oath except in the case of a court of inquiry on recovered prisoners of war or a court on illegal absence, or in cases where the convening officer directs that the evidence shall be so taken. The court will be guided by the written instructions of the convening officer, who must state the general character of the information to be obtained and whether a report is required. It is the duty of the court to test the accuracy of the evidence of witnesses, and take the necessary measures for eliciting the truth. The court will give no opinion on the conduct of any officer or soldier (except in the case of returned prisoners of war) unless so directed by the convening authority. The proceedings are signed by all the members, and if any member differs from the others he can record his opinion separately. The proceedings are forwarded on completion to the convening authority.

The report made by a court is a privileged communication, and cannot be made the subject of a M. vi 98 civil action, and the proceedings of a court of inquiry M. viii 74 or any confession, statement or answer given in the R. 124 course of the proceedings is not admissible in evidence against an officer or soldier, except when the offence of wilfully giving false evidence before the court of inquiry is the subject of trial.

Inquiry affecting character.—When an inquiry R. 124

affects the character or military reputation of an officer or soldier he must be afforded an opportunity of being present, and of giving evidence or making any statement he may wish, and be permitted to cross-examine witnesses and to produce witnesses in defence of his character or military reputation.

An officer or soldier whose conduct is the subject of investigation cannot refuse to attend a court of inquiry if duly ordered to do so, but he may decline to answer any questions or take any part in the proceedings.

An officer or soldier whose character or military reputation is, in the opinion of the Army Council, affected by the evidence or report of a court of inquiry, shall (unless the Army Council sees reason to order otherwise) be entitled to a copy of the proceedings of the court. . . .

Inquiry respecting stores.—All losses or cost of structural repairs exceeding 50*l.* in value in respect of public stores or Government buildings are investigated by a court of inquiry. The G.O.C., after considering the finding of the court, will, according to the circumstances of the case, either apply to the War Office for instructions, deal with the person responsible for the loss to the extent of his powers, or forward a recommendation as to how the loss should be made good and the person responsible for it treated. K. 670 App. xxii

Inquiry as to injuries.—In the case of a soldier becoming seriously maimed or injured (except by wounds received in action), or where there is a doubt as to the cause of the injury or the circumstances under which it was received, a court of inquiry will be held. The court will not give any opinion, but the soldier's commanding officer will formally record his opinion on the evidence, and forward the proceedings to the brigade-commander for confirmation. The fact of the court having been K. 674

held will be noted in the man's medical history sheet, and the proceedings will be attached to the soldier's original attestation.

Inquiry on prisoners of war.—Whenever officers or soldiers are taken prisoners by an enemy a court of inquiry will be assembled to inquire into the conduct of the senior officer or soldier of the party, and, if considered necessary by the convening authority, into the conduct of any other officers and soldiers of the party. The court will be held as soon as possible after the return of the prisoners. K. 675

The members of the court will make a declaration that they will impartially inquire into the circumstances of the case, and the evidence produced will be taken on oath.

The convening authority will direct the court to record their opinion whether the officer or soldier was taken prisoner by reason of the chances of war or through neglect or misconduct on his part, and will record his own opinion.

When an opinion adverse to the character or military reputation of an officer or soldier is formed by the officer who determines the case, the adverse soldier concerned. The proceedings will be forwarded to the War Office.

274. COURT ON ILLEGAL ABSENCE.—A court of inquiry for the purpose of declaring the illegal absence of a soldier will be held in all cases (except in those of absconded recruits) at the expiration of twenty-one days after the date of the absence, or as soon after as is practicable, unless the soldier, although still illegally absent, has been taken into custody. S. 72
R. 125
K. 673
177

In calculating the period of 21 days the day on which the soldier became absent, and the day on which the court is assembled, must be excluded from the reckoning.

The court is usually composed of three officers, who, although not themselves sworn, are empowered

to require the attendance of witnesses and examine them on oath.

The evidence is taken down in writing, and at the end of the proceedings the court is required to declare the fact of the man's absence, and any deficiencies of arms, ammunition, equipments, instruments, regimental necessities, or clothing that are proved to have been in the absentee's possession within a reasonable period of the date when he absented himself. The proceedings should be signed by all the members.

A copy of the declaration of the court, countersigned by the commanding officer, is to be entered in a special regimental book and the original proceedings will then be destroyed. The record thus made, or a duly attested copy thereof, is admissible as evidence of the facts therein contained if the soldier is afterwards brought to trial, and, if he is not apprehended, has the legal effect of a conviction by court-martial for desertion. K. 1912 R. 125 S. 163 S. 72

A court of this description is held when men of the Territorial and Reserve Forces absent themselves without leave while subject to military law. R.F.A. 19 T.F.A.24

275. COURTS OF INQUEST are held by the military authorities on all occasions of death accompanied by violence or suspicious circumstances which occur in military prisons or detention barracks in India, when there is no civil authority competent to hold an inquest. S. 133 R. 127

276. BOARDS.—Committees and Boards differ only from Courts of Inquiry in so far that the objects for which they are assembled should not involve any point of discipline. They will follow, as far as may be convenient, the rules for courts of inquiry, but are in no way bound by them. Boards are usually convened to inspect transports, report on barrack damages and inquire into the cause of fires, inspect libraries and canteens, etc. K. 676

CHAPTER XXVIII

MARTIAL LAW AND CUSTOMS OF WAR.

277. MARTIAL LAW—In the Home Territory—As part of the Laws of War—Example. 278. LAW OF RIOT. 279. LAWS AND CUSTOMS OF WAR.

277. The law of most foreign countries recognises an M.I. 17 intermediate stage between war and peace known by the name of the state of siege, under which the ordinary law is suspended for the time being, by proclamation, and the country is subordinated in whole or in part to military authority, but such a state of things cannot exist under English law, which never pre-supposes the possibility of civil war and makes no express provision for such contingencies.

Martial law in the proper sense of the term, as distinguished from Military law and the Martial law that forms part of the laws and customs of war, means the suspension of ordinary law and the government of a country or part of it by military tribunals. It can only be established in the United Kingdom by an Act of Parliament, or in a self-governing British possession by an Act of the local legislature. In a British possession under the direct *legislative* authority of the Crown a proclamation of martial law by the Crown would be as effective as a Statute in the United Kingdom.

But in the time of invasion or rebellion, or in expectation thereof, exceptional powers are often assumed by the Crown, acting usually (though by no means necessarily) through its military forces,

for the suppression of hostilities or the maintenance of good order within its territories (whether the United Kingdom or British possessions). The expression 'martial law' is sometimes employed as a name for this common law right of the Crown and its servants to repel force by force, and to take such exceptional measures as may be necessary for the purpose of restoring peace and order.

When the exercise of martial law is not sanctioned by statute, the intention of the executive government to assume exceptional powers and to take exceptional measures for the suppression of hostilities and the maintenance of good order is generally announced by a 'proclamation of martial law.' Such a proclamation operates only by way of warning that the government is about to resort, in a given district, to such forcible measures as may be necessary to repel invasion, or suppress insurrection, as the case may be. To obviate any question as to the legality of the measures thus taken, it is usual to pass an Imperial or local Act of Indemnity, for the protection of those engaged, so far as the steps taken by them have been reasonably necessary for the purpose, and carried out in good faith, and for the confirmation of the sentences passed by military courts. A subsequent Act of Indemnity is, of course, not required when the exercise of martial law has been sanctioned beforehand by statute.

Martial law, in a somewhat different sense, forms M. xiv a part of the laws and customs of war. Military necessity justifies a resort to all measures which are indispensable for securing the speedy submission of the enemy with the least possible loss of life and damage to property. Martial law consists of such rules as are adopted, at his own discretion, by a Commander-in-Chief in the field, supplementary, or wholly or partially superseding the laws ordinarily in force in a given district.

The presence of an invading army in a district

is of itself, without any special warning to the inhabitants, a sufficient proclamation that the martial law of that army is in force in that district.

Though martial law applies to all persons and to all property within the district over which it is in force, it is not usual for a British general, except in cases of urgent necessity, to deal with offences by his own troops otherwise than under the Army Act.

In treating certain acts as offences, and fixing the punishment that may be given to them, a general commanding should always be guided by the laws and customs of war as generally accepted.

Stringent measures may be taken to repress all attempts at interference with communications by road, railway, or telegraph, as also acts of marauding or assassination.

A general commanding may also deport from any place within its sphere of operations all persons whose presence therein is considered by him to be dangerous or inconvenient.

Punishment under martial law should as far as possible be inflicted only after inquiry by a military court, convened for the purpose, and no punishment should be inflicted after the termination of hostilities and when recourse can again be had to the ordinary courts of justice.

Example. In the year 1900 the greater part of South Africa was under martial law. The legislatures of Natal and Cape Colony passed Acts creating special courts for the trial and punishment, without juries, of persons charged with high treason and crimes of a political character. The jurisdiction of these courts, both in regard to time and the class of offences dealt with, was limited and eventually martial law was everywhere administered by military courts acting under detailed instructions.

The following principles were laid down. The persons subject to martial law were those within the

limits of the proclaimed districts who were not subject to military law under the Army Act.

No person was to be arrested or tried under martial law except for an offence committed within a proclaimed district, and since the date of the proclamation.

Ordinary common law offences, except such as rendered the offender liable to trial by military courts were, if practicable, to be dealt with before a magistrate under the ordinary law.

Minor breaches of martial law regulations were to be summarily treated by an authorised officer or magistrate, who could award a fine up to 10*l.* or imprisonment up to thirty days.

Treason, aiding or abetting the enemy, overt acts endangering the safety of H.M. Forces, and serious breaches of martial law regulations, were to be tried by military courts.

A military court, consisting of not less than three members, had unlimited powers, and, in addition to the punishments authorised by the Army Act, could award a fine, and order the removal of a convicted person from a proclaimed district. Sentences of death and penal servitude had to be confirmed by the General Commanding-in-Chief.

Instructions were issued that military courts were to conform as far as possible to the Rules of Military Law as laid down for courts-martial in the Manual of Military Law. The forms of general, district, and field general courts-martial were nearly always used.

The commandants of districts or areas were made responsible for the administration of martial law in the territory they controlled, but eventually special administrators of martial law were appointed for each area, who dealt solely with martial law regulations, and did not exercise any military command.

278. LAW OF RIOT.—The primary duty of preserving public order rests with the civil power, and in all countries keeping the peace is entrusted to a special body of men, called police, gendarmes, etc. The law which commands the suppression of unlawful assemblies, riots, and insurrections necessarily justifies the civil power in using force for their suppression. The difficulty is to ascertain what is the necessary degree of force, and the danger of making a mistake in the matter is serious, as any excess in the use of force constitutes a crime.

Occasions arise when the police of the civil power are incapable of preserving peace, and the aid of the soldier is called in. The regulations for the suppression of disturbances by the military power in foreign countries are clear and definite. In England it is otherwise. The instructions given to an officer entrusted with the duty of suppressing a riot are of the most meagre character. For any loss of life or limb caused by his acts he is liable to be criminally indicted, while for hesitation in acting, or forbearance, he is liable to trial both by civil and military courts. Soldiers, in fact, when acting in aid of the civil power, in no respect differ, in the view of the English law, from armed citizens. A great responsibility is thus thrown upon an officer in command of troops called out to suppress a riot. He has to remember that he is for the time being a policeman, and that he must exercise the temper and forbearance of those who are only allowed to use force as a last resort.

Deadly weapons should only be used against rioters who are committing or on the point of committing some felonious outrage which can only be stopped by armed force. As the civil power is primarily responsible for keeping the peace, an officer should always, if possible, place himself under the orders of a magistrate. Experience has shown that

it is advisable to keep the magistrate with the troops and not to lose sight of him. All orders as to firing on a mob, or charging, should be written down and signed by the magistrate, and not accepted verbally.

279. **LAWS AND CUSTOMS OF WAR.**—By the laws and customs of war are meant those principles and rules of conduct which govern the practice of civilised nations when engaged in hostilities. The laws of war on land derive their authority partly from usage but mainly from express international agreement. The diplomatic acts concerned are the Geneva Convention of 1906, the Declaration of St. Petersburg of 1868, the three Hague Declarations of 1899-1907, and the Hague Convention of 1907. The above Acts taken together afford an approximately complete statement of the international law of war on land. xiv

A brief summary of the existing practice of civilised nations is here annexed.

Lawful belligerents.—Hostilities are restricted to the armed forces of the belligerents, and ordinary citizens, who refrain from hostile acts, are treated with as much leniency as is admissible under the conditions of the war. Irregular troops which do not ordinarily form part of an army must be commanded by responsible persons, wear something in the nature of a uniform, carry their arms openly, and conduct their operations in accordance with the laws and customs of war.

The above law is relaxed in favour of the *levée en masse* of the population of a territory that has not been occupied, but in any case arms must be carried openly, and operations conducted in accordance with the laws of war.

Prisoners of war.—Prisoners of war must be humanely treated, properly maintained, and not placed under further restraint than is necessary to prevent them taking further part in the war. Their labour, if utilised, should be paid for, and have nothing to do with the military operations.

They are subject to the regulations and orders of the force into whose hands they have fallen, and such regulations as may be necessary to prevent escape.

An individual return for each prisoner of war is to be kept by an 'Information Bureau,' the work of which is to reply to all inquiries with regard to prisoners, receive and dispatch their letters, and to act in their interests with regard to the disposal of personal effects. They may be set at liberty *on parole*, but are bound scrupulously to fulfil the engagements made. The usual pledge given is not to serve during the existing war, but this only extends to active service in the field, and does not refer to internal service, such as recruiting or drilling recruits, fighting against other belligerents, or civil or diplomatic services. The parole should be in writing and be signed by the prisoner. A soldier, by English practice, can only give his parole through a commissioned officer. The violation of parole is punishable by death, but usually only strict and severe confinement is inflicted.

The conduct of hostilities.—No greater harm should be done to an enemy than necessity requires for the purpose of bringing him to terms. The use of poison, the treacherous killing of persons, and the refusal of quarter is prohibited. No arms, projectiles, or material calculated to cause unnecessary suffering are to be used. Unless justified by the necessities of war, private property is not to be seized or destroyed, nor are undefended towns to be bombarded. In sieges or bombardments steps are to be taken to spare as far as possible edifices devoted to religion, art, science, and charity, as well as buildings covered by the Geneva flag. Pillage is strictly forbidden. Surprise or stratagem must not entail acts of treachery. Spies cannot claim to be treated as prisoners of war, but they must not be punished without trial.

Reprisals are admissible only in extreme cases

where redress for the wrong or punishment of the real offender is unattainable. They should never be resorted to by the individual soldier, but only by order of a commander, and must not be disproportioned to the offence or be of a barbarous character.

The sick and wounded.—All duly recognised mobile medical units are to be respected and protected, and the personnel employed in the collection, transport, and treatment of the wounded and sick are not to be treated as prisoners of war. The material and personnel of medical units that fall into the hands of an enemy may be utilised, but when their services are no longer wanted they should be sent back to their own army. Sick and wounded are to be cared for irrespective of nationality, and a record is to be kept as to their welfare and personal property. The emblem of the Geneva cross is not to be used by unauthorised persons or adopted as a trade mark, and any improper use of the Red Cross flag is to be severely punished.

Property of enemy.—All movable property of the State which may be of use in military operations may be taken possession of, but immovable property such as buildings, forests, etc., must be properly administered. Private property cannot be confiscated, and if private railway plant, telegraphs, etc., are used for war purposes, they must eventually be restored to their owners and compensation paid. Churches, schools, historical monuments, and works of art are to be treated as private property.

Requisitions, either in kind or services, for the needs of a force may be demanded on the authority of a military commander, and must be in proportion to the resources of the country. Supplies should either be paid for or a receipt given for what is taken. Contributions in money should not be levied without the direct order of a Commander-in-Chief.

General population.—The family honour, lives, religion and private property of the population of occupied territory must be respected. They cannot be compelled to take an oath of allegiance or take part in military operations against their own country. Their services may be utilised as guides, or they may be forced to give their labour for repairs to roads, bridges, etc.

Neutral territory.—A neutral state shall disarm and intern any of the forces of either belligerent that may cross its frontier, and shall supply the interned with the food, clothing and relief that may be necessary. Wounded and sick brought into neutral territory must remain under neutral control, but, by mutual agreement with the belligerents, the passage of sick and wounded through neutral territory may in special cases be allowed. At the conclusion of peace all expenses caused by the internment shall be made good.

An armistice is an arrangement for the suspension of hostilities for a limited time. It should be published in all places to which it relates, and during its continuance all equivocal acts of hostility should be abstained from. A cessation of hostilities for a temporary purpose is usually termed a *suspension of arms*.

A capitulation is an agreement for the surrender of a force or place on terms agreed upon by the respective commanders within the limits of their powers.

A flag of truce can only be used legitimately for the purpose of entering into some arrangement with the enemy. Firing during an engagement does not necessarily cease on the appearance of a flag of truce, but when the flag is to be refused admittance the bearer should be signalled to retire.

A *safe-conduct* is a document allowing of the passage of persons or goods through places in time of war where they could not otherwise go without danger. A *passport* usually applies only to the persons named therein.

A *safeguard* is a guard posted by a commanding officer for the purpose of protecting some person or persons or a particular village, mansion or other property. Safeguards like passports and safe conducts only fall within the scope of International Law when posted by arrangement with the enemy. The term safeguard is also applied to a written order by an advancing commander posted on buildings or property notifying that they are exempt from interference on the part of his own troops.

CHAPTER XXIX

MISCELLANEOUS REGULATIONS

280. REDRESS OF WRONGS. 281. RECORDING
OFFENCES—Regimental Conduct Book—Company
Conduct Book. 282. THE LAWS OF ENLISTMENT.
283. BILLETING AND IMPRESSMENT OF CARRIAGES.

280. REDRESS OF WRONGS.—If an officer thinks him- S. 42
self wronged by his commanding officer, and on due
application to him does not receive the redress to
which he may consider himself entitled, he may for- 28
ward a complaint through the usual channel to the
Army Council for submission to His Majesty. In
the event of the commanding officer refusing or delay-
ing unreasonably to forward the complaint it may
be sent direct to the General in command, but the
commanding officer should at the same time be ap-
prised of the fact.

When a soldier has any complaint to make he S. 43
should ask a non-commissioned officer to take him
before the captain of his company, and should then
make his appeal in a temperate tone and with a
respectful manner. If redress is not obtained from
the captain, the soldier may ask that the case be
referred to the commanding officer, and if satisfac-
tion is not then forthcoming may further demand
that his complaint be forwarded to the prescribed
general or other officer.

Complaints must always be forwarded through the
regular channel, except when a captain or com-
manding officer refuses or unnecessarily delays to
forward the appeal. When a direct application is,

for the above cause, made, the captain or commanding officer passed over must be at once informed of the fact.

Officers and soldiers are, however, allowed to make a complaint direct to the inspecting officer at the time of the annual general inspection. K. 128

281. RECORDING OFFENCES.—The offences committed by officers and soldiers are recorded in the following books :—

Regimental conduct sheets.—These will be kept as confidential documents in every unit and corps, for officers, therein serving, who have been convicted by court-martial. No entry will be made of any charge upon which a finding of ‘not guilty’ has been recorded. K. 1918

Regimental conduct sheets.—These will be made out for every N.C. officer and man and those of N.C. officers of the rank of colour-sergeant and upwards will be kept as confidential documents. In the sheets are entered :— K. 1919

1. *Every conviction by court-martial*, but no entry will be made of any charge upon which a finding of ‘not guilty’ has been recorded.

2. *Every case of desertion or fraudulent enlistment in which trial has been dispensed with.*

3. *Every conviction by the civil power* for offences committed after enlistment or while in a state of desertion. Where the offender does not undergo imprisonment but is bound over for judgment or simply pays a fine or legal costs, omission of the entry may be ordered by an officer not under the rank of brigadier-general.

Certified copies of all convictions by the civil power will be annexed to the sheets, and if imprisonment exceeding seven days has been awarded, the certified record will be produced in evidence at a trial as a former conviction. When the imprisonment is for seven days and under, it will be treated as an ordi-

nary regimental entry with regard to the forfeiture of good conduct badges.

4. *Every severe reprimand of a N.C. officer.*
5. *Every case of reduction of a N.C. officer to a lower grade, or to the ranks, or deprivation of a lance stripe, for an offence but not for inefficiency.*
6. *Every award by the C.O. of detention or (on active service) of field punishment or forfeiture of pay.*
7. *Confinement to barracks exceeding seven days.*
8. *Every instance of drunkenness.*
9. *Punishment on board ship laid down by regulation as equivalent to a regimental entry.*
10. *Every offence entailing forfeiture of pay except (a) for absence without leave not exceeding two days, (b) in the case of a fine by a civil court when a superior authority has directed omission of entry, (c) for offences committed before enlistment.*
11. *Punishments in military prisons or detention barracks.*
12. *Every conviction of Reservists under S. 6 R. F. Act.*
13. *Every admission to hospital on account of alcoholism.*
14. *Any especial act of gallantry or distinguished conduct will be entered in red ink and written right across the sheet.*

Company conduct sheets. These contain a record of **K. 1924** every offence committed by N.C. officers under the rank of colour-sergeant and men for which punishment has been awarded, except offences (other than drunkenness or those involving forfeiture of pay) for which one day's C.B. or its equivalent punishment on board ship, or one extra guard, has been awarded. Admonition will not be entered except in cases of drunkenness, and in those involving forfeiture of pay. Acts of drunkenness are numbered consecutively in red ink, and every admission to hospital on account of drink will be entered in red ink.

282. LAW OF ENLISTMENT.—A person is deemed to S. 80
be enlisted upon signing the declaration in the attes-
tation paper and taking the oath of allegiance.

A person may be enlisted, for a period not exceed- S. 76
ing twelve years, to serve as a soldier either in the S. 78
army (long service) or partly in the army and
partly in the reserve (short service). The condi-
tions of the original enlistment may be varied from
time to time by regulation, and a soldier, with his
assent, may be permitted to enter the reserve for the
residue of his original enlistment, or to *extend* his army
service instead of entering the reserve, or to re-enter
upon army service after passing to the reserve.

In time of war, or when the reserve is called out S. 87
by proclamation, or when on service beyond the
seas, a soldier who would otherwise be discharged
may have his service *prolonged* for one year. Simi-
larly, a soldier entitled to transfer to the reserve
may in time of war be *detained* in army service for a
year, and any soldier may in time of war agree to
continue his army service until the end of the war.

A soldier in army service may after nine years be S. 84
allowed, under certain conditions, to *re-engage* so as
to complete twenty-one years' army service, and in ex-
ceptional cases is allowed to *continue* in the service S. 85
beyond twenty-one years, subject to his right to de-
mand discharge at three months' notice.

A soldier may be *transferred* from one corps to S. 83
another at any time, with his own consent. Trans-
fers of soldiers to another corps of the same branch
of service may be ordered (1) within three months
of attestation if enlisted for general service; (2)
when punishment for an offence has been com-
muted wholly or partially to general service; (3)
when ordered home from abroad and more than two
years of army service is unexpired; (4) when ordered
abroad within two years of the expiration of army
service; (5) when invalided from abroad or medi- S. 89

cally unfit to go abroad. In the last two cases the soldier may be transferred to the reserve.

A soldier can only be *discharged* by sentence of S. 92 a court-martial or by order of a competent military authority, but a soldier within three months of his S. 81 attestation may obtain a discharge on payment of 10*l.*, or may apply for discharge on account of any error or illegality in his enlistment. After three S. 100 months' service the permission of the officer commanding is necessary, and the sum will be 18*l.* After K. 392 twelve years' service a free discharge is granted.

A soldier is not liable to be taken out of the service S. 144 except on account of a charge of or conviction for crime; or for a debt that exceeds 30*l.*; or when a S. 96 civil court orders an apprentice or indentured labourer to be given up; or when parish authorities claim a soldier in cases of wife desertion.

283. BILLETING AND IMPRESSMENT OF CAR- K. 1383
RIAGE.—Orders for the movement of troops in the United Kingdom are conveyed by means of 'routes.' On production of a *route*, the constable in charge S. 103 of any place shall *billet* on victualling houses the officers, soldiers, and horses mentioned in the route. S. 108 The billets, when made out by the constable, are delivered to the billeting party, which has usually preceded the unit on the march. The keeper of each victualling house has to furnish the food and S. 106 accommodation authorised, and is paid for the same the prices sanctioned by Parliament. Where S. 108. A directions have been given for embodying all or any part of the Territorial Force, and a state of emergency is proclaimed, the occupiers of all public buildings, dwelling-houses, barns and stables, shall also be liable to billets.

Under an ordinary *route* the civil authorities may S. 112 be called on to provide such carriages, animals, and drivers as are required for moving the regimental baggage and stores.

Under a *requisition of emergency* can be demanded S. 115
carriages, and horses of every description, and barges
and other vessels used in inland navigation, and
aircraft of all kinds, for the purpose mentioned in
the requisition. Whenever a proclamation ordering
the Army Reserve to be called out on permanent ser-
vice is in force, carriages (including motor cars and
other locomotives), animals, and vessels may be
purchased as well as hired on behalf of the Crown, and
such carriages, animals, and vessels may, if not forth-
coming or refused, be forcibly taken possession of. The
procuring of transport on mobilisation may be assigned
by the Army Council to County Associations.

All troops on the march, with their horses, carriages,
baggage, and prisoners, are exempt from tolls on S. 143
roads, bridges, piers, and landing-places. Vessels
employed on canals are only exempt from tolls when
they are supplied under a requisition of emergency.

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[The crimes specified in the Army Act, which have not been made the subject of special comment, are to be found in Chapter XVIII., and are not referred to in the Index.

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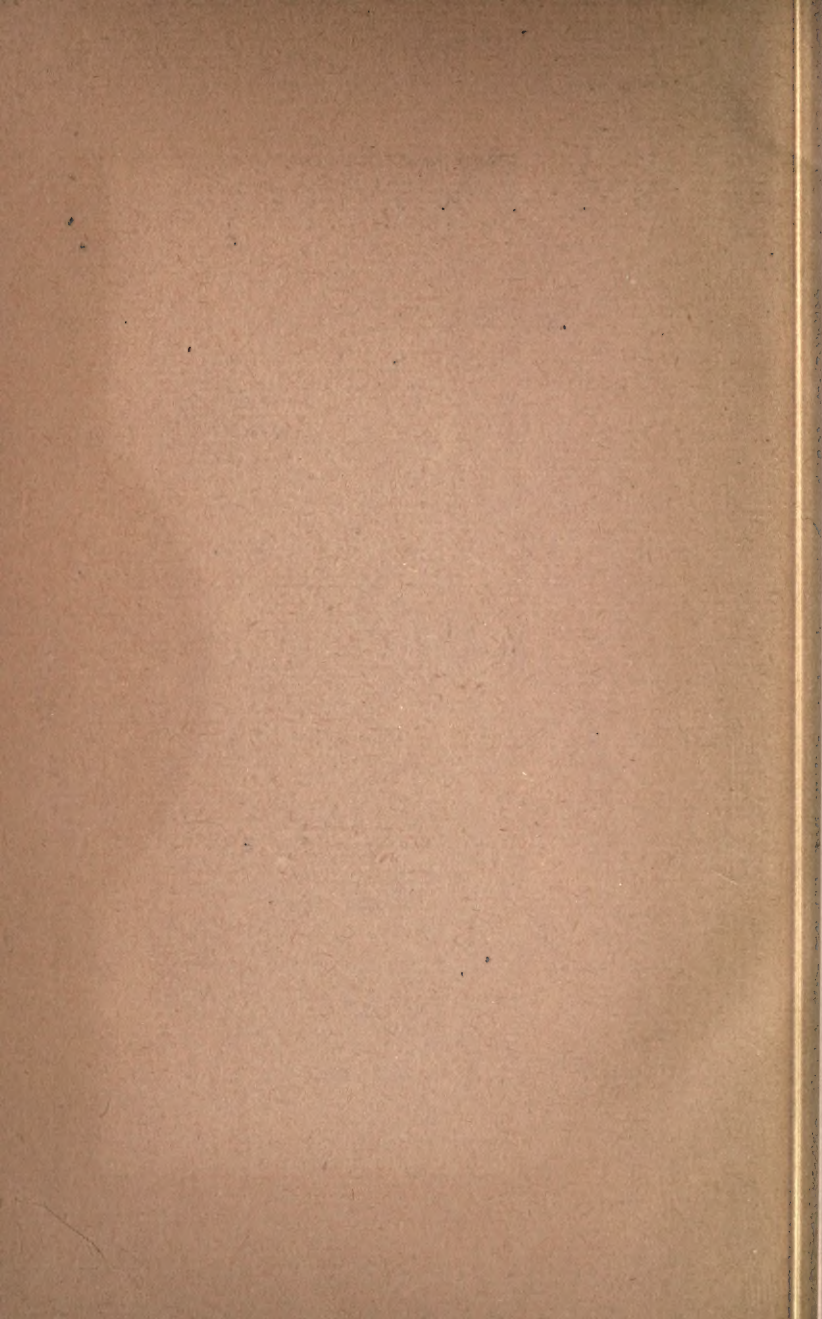
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